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In The

Supreme Court Of The United States

October Term, 1992

STATE OF CONNECTICUT, *Petitioner,*

v.

KARIN APARO, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

RICHARD N. PALMER
Chief State's Attorney
State of Connecticut

STEVEN M. SELLERS
Assistant State's Attorney
Director of Operations
Office of the Chief State's Attorney

SUSANN E. GILL
Supervisory Assistant State's Attorney
Appellate Unit
Office of the Chief State's Attorney

Counsel of Record:

JUDITH ROSSI
Assistant State's Attorney
Office of the Chief State's Attorney
340 Quinnipiac Street
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373

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QUESTIONS PRESENTED

I. Did the Connecticut Supreme Court err in extending the principle of collateral estoppel to the retrial of a mistried count, where at the original trial on a two-count information the jury, while acquitting the respondent on one count, failed to reach a verdict on the other count?

II. If the principle of collateral estoppel is applicable following a mixed result of acquittal and jury deadlock, does it preclude the state on retrial of the mistried count from using evidence which was proffered at the first trial?

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF CONNECTICUT,
Petitioner,

v.

KARIN APARO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

The State of Connecticut respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Connecticut, entered in this proceeding on August 11, 1992.

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 223 Conn. 384, 614 A.2d 401 (1992) and is reprinted in the appendix to this petition at pp. A1 *et seq.*, *infra*.

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JURISDICTION

The judgment and opinion of the Connecticut Supreme Court were entered on August 11, 1992, remanding the case to the lower court with direction and order for retrial. The motions of the parties for reargument and/or reconsideration were denied on September 17, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257. The challenged decision is a final judgment within the meaning of 28 U.S.C. §1257(3). The questions raised in this petition fall within the category of final judgments which includes "those situations where the federal claim has been finally decided . . . but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 481 (1975). The record shows that the judgment of the Connecticut Supreme Court fully adjudicated the rights of the parties on the issues before it in this criminal case, and that adjudication is not subject to further review by a state court. *Department of Banking v. Pink*, 317 U.S. 264 (1942).

The important federal questions raised in this petition will be effectively unreviewable after the retrial. Should the petitioner obtain a conviction of the respondent on retrial, its claims will be moot. Should the respondent be acquitted on retrial, the petitioner will be precluded by principles of double jeopardy from pressing its federal claims on appeal. *See New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984); *California v. Stewart*, 383 U.S. 436, 498 n.71 (1966).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, Section I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes Section 53a-8:

Criminal liability for acts of another. A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the prinicipal offender.

Connecticut General Statutes Section 53a-48(a):

Conspiracy. (a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

Connecticut General Statutes Section 53a-54a(a):

Murder. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception' except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be,

provided nothing contained in this subsection shall constitute a defense to prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

STATEMENT OF THE CASE

The respondent, Karin Aparo, was arrested following a homicide investigation by the Glastonbury, Connecticut Police Department and the Connecticut State Police into the death of Joyce Aparo, the respondent's mother. Dennis Coleman, the respondent's former boyfriend, confessed to killing Joyce Aparo and implicated the respondent in the crime. She was charged with one count of murder as an accessory, in violation of Connecticut General Statutes §§53a-54a(a) and 53a-8; and one count of conspiracy to commit murder, in violation of §§53a-48(a) and 53a-54a(a).

The resondent entered pleas of not guilty and was tried before a jury of twelve. The evidence at the lengthy trial is set forth in detail at pages 393-401 of the Connecticut Supreme Court's opinion. The state's case against the respondent consisted primarily of the testimony of Dennis Coleman, substantiated in part by physical exhibits including correspondence, and by the testimony of two of the defendant's friends. The jury found the respondent not guilty on the charge of accessory to murder, but was

unable to reach a verdict on the conspiracy count. Accordingly, the trial court entered a judgment of acquittal on the accessory charge, and declared a mistrial on the conspiracy count.

Following the state's declaration of its intent to retry the respondent for conspiracy to commit murder, she filed a pre-trial motion to dismiss the charge, contending, *inter alia*, that retrial was barred by principles of double jeopardy and collateral estoppel. The trial court denied the motion to dismiss.

The respondent appealed to the Connecticut Supreme Court, which affirmed in part and reversed in part the trial court's ruling on the motion to dismiss.

On appeal, the respondent claimed that the trial court improperly denied her motion to dismiss the conspiracy count which relied on the constiutional principle of collateral estoppel, as set forth in *Ashe v. Swenson*, 397 U.S. 436 (1970). She claimed that, because it was undisputed that she told Coleman that her mother was home alone on the evening of August 4, the verdict of acquittal on the accessory charge demonstrated that the jury neces-

sarily found that she did not have the intent to kill her mother. She argued that, because the element of intent to kill had been found in her favor, and because such intent is also an element of the conspiracy charge, collateral estoppel wholly precluded retrial of the conspiracy charge.

In its opinion the Connecticut Supreme Court initially considered whether collateral estoppel even applies to cases such as this one, where the jury had acquitted on one count of a multicount indictment and failed to reach a verdict on another count, and concluded that it does apply. *State v. Aparo*, 223 Conn. at 391-92.

The Connecticut Supreme Court then rejected the respondent's argument that by its verdict of acquittal on the accessory count the jury had necessarily decided the element of intent to kill in the respondent's favor. After a thorough review of the evidence, 223 Conn. at 393-401; the court determined that the jury, in acquitting the respondent of accessorial liability for the murder, could have had a reasonable doubt whether she encouraged or intentionally aided Coleman in committing the murder. *Id.* at 403-404. However, because encouraging or aiding in a murder is not

an element of conspiracy to commit that murder, collateral estoppel did not bar retrial of the conspiracy charge. *Id.* at 404.

The court then considered the respondent's claim that, even if retrial were not precluded, collateral estoppel required that much of the state's evidence from the first trial be excluded from the second trial. The respondent claimed that the verdict of acquittal necessarily indicated that the jury disbelieved all of the state's evidence regarding her activities and state of mind during the time period July 14 to August 5, 1987, the time period during which she had been charged with being an accessory, and which was included in the time period alleged by the state for the conspiracy.

The Connecticut Supreme Court recognized that in *Dowling v. United States*, 493 U.S. 342 (1990), this Court declined to extend *Ashe v. Swenson* to exclude from a defendant's criminal trial otherwise admissible evidence, solely because it related to criminal conduct for which the defendant had previously been acquitted. 223 Conn. at 406-7. The state supreme court also recognized that evidence

of predicate facts, as opposed to ultimate facts, need not be proven beyond a reasonable doubt and thus is not barred by collateral estoppel. *Id.* Nevertheless, the court concluded, "the prior acquittal indicates that the jury necessarily rejected some evidence that, if believed, could establish essential elements of conspiracy, specifically agreement, intent to agree, and intent to kill." *Id.* at 409. The court held that on retrial the state could not use Coleman's testimony that the respondent requested, on the evening before the murder, that Coleman kill her mother, which the court concluded had necessarily been rejected by the jury. *Id.* at 410. The court concluded that this previously rejected evidence, if found on retrial to have been proven beyond a reasonable doubt, would establish an element of the conspiracy charge and and could form the basis of a conviction. *Id.* The supreme court remanded to the trial court for a determination of whether, in addition to the portion of Coleman's testimony it specifically ruled inadmissible, other evidence proffered by the state should be excluded from retrial. *Id.* at 410-11.

REASONS FOR GRANTING THE PETITION

I. The Connecticut Supreme Court Erred In Holding That The Principle Of Collateral Estoppel Applies To Cases Of Continuing Jeopardy, Where The Jury, On A Multicount Information, Acquits The Defendant On One Count And Fails To Reach A Verdict On The Other Count, And The State Intneds To Retry The Defendant On The Mistried Count

This Court has never whether collateral estoppel is applicable at all to situations where the state initially joined two offenses in one indictment or information and never contemplated more than one trial, but the jury deliberations resulted in an acquittal on one count and a deadlock/mistrial on the other.

Collateral estoppel, an aspect of double jeopardy protection, operates after an acquittal to prevent the state from re-litigating issues of ultimate fact decided by the acquittal in the defendant's favor. *Ashe v. Swenson*, 397 U.S. 436 (1970).

This Court's collateral estoppel cases have concerned successive prosecutions, as opposed to retrial after a mistrial. In the successive prosecution scenario there is no question that jeopardy has terminated at the end of the

first trial, and that the second trial will involve new and/or different charges. *Dowling v. United States*, 493 U.S. 342, 110 S.Ct. 668 (1990); *Ashe v. Swenson*, *supra*; *see Sealfon v. United States*, 332 U.S. 575 (1948)(res judicata precluded second prosecution, where jury verdict in first trial was a determination favorable to defendant on facts essential to the second prosecution).

This Court has ruled that, where a jury deadlock has resulted in a mistrial, the double jeopardy principle is not implicated, because jeopardy on the mistried count has not yet terminated. *Sanford v. United States*, 429 U.S. 14 (1976). Retrial is also constitutionally permitted even when the trial resulted, in addition to the mistrial, in an acquittal on another count. *Richardson v. United States*, 468 U.S. 317, 325 (1984).

The continuing jeopardy principle should preclude the application of collateral estoppel in the acquittal-deadlock-retrial scenario. In this context, continuing jeopardy is analogous to the circumstances of *Price v. Georgia*, 398 U.S. 323 (1970), where acquittal on a greater offense does not preclude retrial of a lesser offense to

which continuing jeopardy has attached, where conviction of that offense reversed on appeal, even though defendant had been acquitted of greater offense.

Furthermore, where the second trial is the result of a neutral occurrence, such as the jury deadlock in the present case, and not prosecutorial abuse or manipulation, a criminal defendant should not be able to assert collateral estoppel on retrial any more than he or she would be able to assert a double jeopardy bar. *See Brown v. Ohio*, 420 U.S. 332 (1975) (where government could have, but did not, try greater and lesser offenses in single proceeding, double jeopardy precludes subsequent trial).

The Connecticut Supreme Court's application of constitutional collateral estoppel, where double jeoprady is not even implicated, conflicts with this Court's recent pronouncements on double jeopardy law. In *United States v. Felix*, ___ U.S. ___, 112 S.Ct. 1377, 1384-85 (1992), this Court held that double jeopardy does not preclude a prosecution of a conspiracy charge despite a prior prosecution of the underlying substantive crime, even where there is an overlap of proof. *See Grady v. Corbin*, 495 U.S. 508

(1990) (rejecting "same evidence" test to determine whether double joepardy implicated in successive prosecutions).

But if collateral estoppel applies in such situations, a criminal defendant could still avoid prosecution. Even if that consequence should be borne by the state where it has chosen a strategy of successive prosecutions, collateral estoppel should not apply where the state tried both counts simultaneously and where jeopardy continues from the first trial. Indeed, in *Ohio v. Johnson*, 467 U.S. 493, 500 n.9 (1984), this Court said in *dicta* "[W]here the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable."

Furthermore, because the aquittal-deadlock situation is analogous to inconsistent verdicts, collateral estoppel should have no effect. The law tolerates inconsistent verdicts, despite the possibility that the jury usurped authority that it did not have, or that it may have acted with leniency despite believing the defendant guilty. *United States v. Powell*, 469 U.S. 57 (1984); *Dunn v. United States*, 284 U.S. 390 (1932). The principle of collateral

estoppel, which is predicated on the assumption that the jury acted rationally, has no application to the inconsistent verdict situation. *United States v. Powell*, 469 U.S. at 68; *Standefer v. United States*, 447 U.S. 10, 23 n.17 (1980). If the verdicts are consistent, then no issue of ultimate fact decided at the first trial will be at issue in the second trial, so collateral estoppel cannot apply.

The Connecticut Supreme Court's expansive use of collateral estoppel is questionable in light of decisions by this Court in the successive prosecution context in *Yates v. United States*, 354 U.S. 298 (1957), and in *Dowling*, which refused to extend *Ashe* to preclude the reuse of otherwise relevant and admissible evidence. There is no legal or logical reason for affording the principle of collateral estoppel broader use where the charges were intially tried together.

A few federal and state courts have questioned whether collateral estoppel, like its constitutional parent double jeopardy, is limited to successive prosecutions and thus has no applicability in the acquittal-deadlock-retrial context. *See, e.g., United States v. Farmer*, 923 F.2d 1557,

1563 (11th Cir. 1991)(questioning whether collateral estoppel even applies in continuing jeopardy cases); *Butler v. Maryland*, 605 A.2d 186, 202 n.13 (Md. 1992) ("serious doubt" whether collateral estoppel applies to retrial following acquittal-deadlock); *see also United States v. Seijo*, 537 F.2d 694, 699 (2d Cir. 1976)(declining to consider whether collateral estoppel applies to retrial). Other courts have recognized the holding of *Ashe* regarding constitutional collateral estoppel to be limited to its facts, i.e., the relitigation of a ultimate issue of fact in a subsequent prosecution. *See, e.g., United States v. Head*, 697 F.2d 1200, 1205 (4th Cir. 1982).

This Court should grant the petition so that it may consider whether constitutional concerns are even implicated in the acquittal-deadlock-retrial context, which lacks the inherent oppressiveness and unfairness that collateral estoppel traditionally protects against. If *Ashe* establishes a preference for joinder in the first instance of all related charges, that goal was met here. If the principle of collateral estoppel discourages overeager prosecutors from serial prosecutions seeking multiple convictions from the same

transaction, that consideration is not implicated in the acquittal-deadlock-retrial context. Moreover, considerations inherent in the criminal process weigh against expanding collateral estoppel to the continuing jeopardy situation. These considerations include the state's compelling interest in the enforcement of its criminal laws, and the public's interest in the accuracy and justice of the results in criminal trials.

II. If Collateral Estoppel Applies In Cases Of Continuing Jeopardy, It Precludes Only Relitigation Of Ultimate Issues And Does Not Operate To Bar The Reuse Of Evidentiary Facts

The second important question presented by this case is, if collateral estoppel applies at retrial following an acquittal-deadlock, whether it results in issue preclusion only, or whether is may be applied to preclude the prosecution from using evidence that had dual relevance at the first trial; i.e., where the same evidentiary facts were proffered at the first trial on both the acquitted count and the deadlocked count.

Collateral estoppel does not bar the relitigation of every factual issue. In *Yates v. United States*, 354 U.S. 298

(1957), this Court rejected the claim that, where nonconstitutional collateral estoppel does not bar retrial, it can nevertheless have partial conclusive effect, to bar evidentiary issues. The Court stated:

> We think, however, that the doctrine of collateral estoppel does not have any such concept of "conclusive effect" as that contended for by the petitioner. The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding. So far as merely evidentiary or "mediate" facts are concerned, the doctrine of collateral estoppel is inoperative.

354 U.S. at 337-38. There is no legal or logical basis for giving constitutional collateral estoppel greater effect.

"An ultimate fact is an issue which is the *sine qua non* of a conviction in the second trial." *People v. Goodman*, 503 N.E. 2d 996 (N.Y. 1986). In *Ashe*, which speaks only of "ultimate" facts, this Court held that collateral estoppel entirely barred a subsequent prosecution where the state sought to relitigate the same *legal* issue decided in the first trial. *United States v. Davis*, 809 F.2d 1194, 1206 (6th Cir. 1987). In *Dowling v. United States*, this Court refused to convert collateral estoppel protection into

a blanket prohibition on the reuse of evidence in a subsequent prosecution after acquittal in a prior trial. Where evidence found in the defendant's favor at the first trial is not an "ultimate" fact at the second trial, it is admissible as an evidentiary fact.

In addition, use of collateral estsoppel to preclude evidentiary facts conflicts with *Grady v. Corbin*, 495 U.S. 508 (1990); which held that the double jeopardy clause "bars any subsequent prosecution in which the government to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U.S. at 521. The Court went on to say that "This is not an 'actual evidence' or 'same evidence' test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." *Id.* *See United States v. Felix*, 112 S.Ct. at 1385 (*Grady* does not bar successive prosecutions involving the same conduct, even where there is an overlap of proof).

Even though *Grady* was a "pure" double jeopardy case, at least one court has recognized that *Grady*'s "con-

duct constituting an offense" test applies with equal force to determine whether collateral estoppel requires that certain evidence must be excluded on retrial. *United States v. Farmer*, 923 F.2d 1557, 1564 n.16 (11th Cir. 1991). When that test is applied here, it is evident that the state is not seeking to relitigate the respondent's accessorial liability. thus the reuse of evidence should not have been barred by the Connecticut Supreme Court.

In spite of these pronouncements, the Connecticut Supreme Court precluded the state's reuse of certain factual evidence, even where on retrial those facts, arguably found in the respondent's favor at the first trial, will not be the only evidence offered to establish any element of the conspiracy charge. In so doing, the state court erroneously expanded the collateral estoppel principle beyond issue preclusion and into an unwarranted restriction on the prosecution's proof.

The Connecticut Supreme Court also erred in finding a constitutional basis for its proof-limiting application of collateral estoppel. Where the application of collateral estoppel would merely restrict proof, but would

not preclude relitigation of an ultimate fact, so as to bar a second prosecution, it may implicate the common law defenses of res judicata or collateral estoppel, but it does not raise constitutional concerns. *See Sealfon v. Untited States*, *supra*; *see also Standefer v. United States*, 447 U.S. 10 (1980) (refusing to extend nonmutual collateral estoppel to criminal cases); *Harris v. Washington*, 404 U.S. 55 (1971)(collateral estoppel protects defendant against subsequent prosecution). Double jeopardy guarantees are not implicated by proof-limiting claims, and thus the collateral estoppel principle in such situations is not constitutional in nature. *See United States v. Abney*, 431 U.S. 651, 659 (1977)(contrasting double jeopardy and evidence suppression rulings); *United States v. DeVincent*, 632 F.2d 155, 160-61 (1st Cir. 1980)(recognizing distinction between proof-limiting and constitutional collateral estoppel), *cert. denied*, 450 U.S. 984 (1981).

Finally, the Connecticut Supreme Court's decision conflicts with courts holding that an acquittal on one set of facts does not preclude use of the same evidence at a subsequent trial. *United States v. Farmer*, 923 F.2d at 1564;

United States v. Dray, 901 F.2d 1132 (1st Cir. 1990); *United States v. Gentile*, 816 F.2d 1157 (7th Cir. 1987); *United States v. Davis*, 809 F.2d 1194, 1206 (6th Cir. 1987); *Flittie v. Solem*, 751 F.2d 967, 972 (8th Cir. 1985), *cert. denied*, 475 U.S. 1025 (1986); *United States v. Price*, 750 F.2d 363 (5th Cir. 1985); *United States v. Ballard*, 586 F.2d 1060 (5th Cir. 1978); *United States v. Kills Plenty*, 466 F.2d 240 (8th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *People v. Goodman*, 69 N.Y.2d 32, 511 N.Y.S.2d 565, 503 N.E.2d 996 (1986). One court has formulated the test as whether the evidence has "independent significance" on the retried count, where the issue is "wholly distinct" from any issue decided by the jury at the initial trial. *United States v. Dray*, 901 F.2d at 1138-39. In the present case, all of the state's evidence had independent significance on each count.

CONCLUSION

The Connecticut Supreme Court has broadened the constitutional principle of collateral estoppel by applying it in the acquittal-deadlock-retrial context. It has also disregarded this Court's limitations on the use of constitu-

tional collateral estoppel by expanding its application to proof-limiting situations which are outside the scope of double jeopardy concerns.

The writ of certiorari should be granted to address these important issues.

Respectfully submitted

THE STATE OF CONNECTICUT,
Petitioner.

RICHARD N. PALMER
Chief State's Attorney
State of Connecticut

STEVEN M. SELLERS
Director of Operations

SUSANN E. GILL
Supervisory Assistant State's Attorney

JUDITH ROSSI*
Assistant State's Attorney
Office of the Chief State's Attorney
340 Quinnipiac Street - P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373
Juris No. 401845

*Counsel of Record

December, 1992

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APPENDIX

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Opinion of the Connecticut Supreme Court..... 1A

STATE OF CONNECTICUT *v.* KARIN APARO (14443)

PETERS, C. J., GLASS, COVELLO, BERDON and SANTANIELLO, Js.

The defendant appealed to this court from the trial court's denial of her motion to dismiss all charges pending against her. The defendant, who had been charged with the crimes of murder as an accessory and conspiracy to commit murder in connection with the killing of her mother by her then boyfriend, C, had been acquitted of the accessory charge but the twelve member jury could not reach a verdict on the conspiracy charge. *Held:*

1. There was no merit to the defendant's claim that, because she obtained at least six votes for acquittal on the conspiracy charge, and because that charge could have been tried by a jury of six, the double jeopardy clause of the fifth amendment barred a second prosecution for that crime; had the defendant preferred a jury of six for both charges she could have so elected, and because the jury did not come to any conclusion on the conspiracy charge, the vote tally had no legal significance.
2. Although collateral estoppel bars the state from relitigating a question of fact that has been determined by a partial verdict in the defendant's favor, retrial on the conspiracy charge was not precluded, under the circumstances here; the jury's conclusion that there was a reasonable doubt as to whether the defendant had solicited, requested, commanded, importuned, or intentionally aided C was not inconsistent with the conclusion that the defendant had entered into a conspiracy with C to commit murder.
3. The trial court, in denying the defendant's motion to dismiss, should not have determined that no evidence should be excluded on retrial; accordingly, on retrial, that court must exclude evidence offered in the first trial if it can be demonstrated that the jury, in acquitting the defendant on the accessory charge, harbored a reasonable doubt as to the truth of the fact sought to be proven and that the alleged fact, if proven, would establish an element of the offense of conspiracy and could, therefore, form the basis of a conviction on that count.

Argued June 2—decision released August 11, 1992

Motion to dismiss the second count of an information charging the defendant with the crime of con-

spiracy to commit murder, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the court, *Damiani, J.*; judgment denying the motion to dismiss, from which the defendant appealed. *Affirmed in part; reversed in part.*

Hope C. Seeley, with whom, on the brief, was *Hubert J. Santos,* for the appellant (defendant).

Judith Rossi, assistant state's attorney, with whom, on the brief, were *John M. Bailey,* state's attorney, and *James E. Thomas,* senior assistant state's attorney, for the appellee (state).

PETERS, C. J. The principal issue in this appeal is whether the principles of double jeopardy and collateral estoppel prohibit the state from retrying, on a charge of conspiracy to commit murder, a defendant who has been acquitted of a charge of accessory to murder. The defendant, Karin Aparo, was charged with one count of murder as an accessory in violation of General Statutes §§ 53a-54a (a)[1] and 53a-8,[2] and one count of con-

[1] General Statutes § 53a-54a provides: "MURDER. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

"(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.

"(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony."

[2] General Statutes § 53a-8 provides: "CRIMINAL LIABILITY FOR ACTS OF ANOTHER. A person, acting with the mental state required for commission

spiracy to commit murder in violation of General Statutes §§ 53a-48 (a)[3] and 53a-54a (a). A jury acquitted her of the accessory charge but could not reach a verdict on the conspiracy charge. After the trial court declared a mistrial on the conspiracy count, the state announced its intention to retry the defendant on that count. The defendant filed a motion to dismiss all pending charges. Upon the trial court's denial of this motion, the defendant took an interlocutory appeal to the Appellate Court, which we transferred to ourselves pursuant to Practice Book § 4023 and General Statutes § 51-199 (c).[4] We affirm in part and reverse in part.

The defendant has raised three issues on appeal. She maintains that the trial court should have granted her motion to dismiss and barred her retrial for conspiracy because: (1) principles of double jeopardy preclude retrial when six out of twelve jurors vote for acquittal; (2) principles of collateral estoppel preclude retrial, because the jury necessarily found that she had never intended that her mother be killed; and (3) principles of collateral estoppel require the exclusion of certain

of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

[3] General Statutes § 53a-48 provides: "(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

"(b) It shall be a defense to a charge of conspiracy that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

[4] "Colorable claims of double jeopardy are an exception to the general rule that appeals in criminal cases must ordinarily await the final judgment that arises from imposition of sentence." *State* v. *Boyd*, 221 Conn. 685, 688 n.4, A.2d (1992); *Abney* v. *United States*, 431 U.S. 651, 659-62, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977).

evidence, leaving insufficient admissible evidence to warrant a retrial. We reject the first and second of these claims, and accept the third in part.

I

The defendant first claims that, because she obtained six votes for acquittal on the conspiracy count, and because that count could have been tried by a jury of six, the double jeopardy clause of the fifth amendment, which "serves to safeguard defendants in criminal proceedings against multiple punishments or repeated prosecutions for the same offense"; *State* v. *Aillon*, 182 Conn. 124, 127, 438 A.2d 30 (1980), cert. denied, 449 U.S. 1090, 101 S. Ct. 883, 66 L. Ed. 2d 817 (1981); protects her against a second prosecution.

On February 17, 1988, the defendant moved to sever the murder and conspiracy counts on the ground, inter alia, that she was entitled under General Statutes §§ 54-82b (c) and 54-82 (c) to a jury of twelve for the crime of murder and a jury of six for the crime of conspiracy. On April 26, 1990, she supplemented her motion by arguing in the alternative that, if the court denied the motion to sever the counts, two juries should be empaneled, one of twelve jurors for the murder count and one of six jurors for the conspiracy count. The motion was denied and an exception was taken.

The vote on the mistried conspiracy count was seven to five for acquittal. The defendant contends that, having secured at least six votes in her favor, she is protected by principles of double jeopardy from retrial. She claims that this is so, first, because she alleges that the trial court should have granted her request for a jury of six on the conspiracy count, and second, because the factual elements of the conspiracy count were resolved in her favor by six jurors, the same number she would have to persuade on retrial.

Section 54-82b (c) provides: "In any criminal trial by a jury, except as otherwise provided by law, such trial shall be by a jury of six." Section 54-82 (c) provides that "no person, charged with an offense which is punishable by death or life imprisonment, shall be tried by a jury of less than twelve without his consent." We do not read these provisions to require that separate juries be provided when only some of the charges against a defendant are punishable by death or life imprisonment. Had the legislature intended such an extraordinary measure, it would have explicitly provided for it. In this case, had the defendant preferred a jury of six, she could have so elected.

We decline the defendant's invitation to speculate that, had she consented to a trial before a jury of six, it would have consisted of six of the seven jurors who voted for acquittal. Because the jury did not come to any conclusion, the vote tally is legally irrelevant. "It is settled doctrine in Connecticut that a valid jury verdict in a criminal case must be unanimous. . . . A nonunanimous jury therefore cannot render any 'finding' of fact." *State* v. *Daniels*, 207 Conn. 374, 388, 542 A.2d 306 (1988), cert. denied, 489 U.S. 1069, 109 S. Ct. 1349, 103 L. Ed. 2d 817 (1989). This claim is therefore without merit.

II

Next, the defendant claims that collateral estoppel prevents the state from retrying her on the charge of conspiracy, because such a retrial would permit the state to relitigate issues necessarily decided in her favor in the first trial. Collateral estoppel is given constitutional dimensions by the double jeopardy clause. It is well established that retrial following a jury deadlock does not violate the constitutional provision against double jeopardy. *Aillon* v. *Manson*, 201 Conn. 675, 678, 519 A.2d 35 (1986); *State* v. *Aillon*, supra, 129–30.

We recently discussed in some detail the relationship between double jeopardy and collateral estoppel. In *State* v. *Hope*, 215 Conn. 570, 577 A.2d 1000 (1990), cert. denied, U.S. , 111 S. Ct. 968, 112 L. Ed. 2d 1054 (1991), we stated: "In a criminal case, collateral estoppel is a protection included in the fifth amendment guarantee against double jeopardy. *Ashe* v. *Swenson*, 397 U.S. 436, 445, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). ' "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' Id., 443. 'Collateral estoppel applies in two ways: (1) it may bar prosecution or argumentation of facts necessarily established in a prior proceeding; or (2) it may completely bar subsequent prosecution where one of the facts necessarily determined in the former trial is an essential element of the conviction the government seeks. *United States* v. *Griggs*, 735 F.2d 1318 (11th Cir. 1984).' *United States* v. *DeMarco*, 791 F.2d 833, 836 (11th Cir. 1986).

"To establish whether collateral estoppel applies, the court must determine what facts were necessarily determined in the first trial, and must then assess whether the government is attempting to relitigate those facts in the second proceeding. *De La Rosa* v. *Lynaugh*, 817 F.2d 259, 263 (5th Cir. 1987); *United States* v. *Irvin*, 787 F.2d 1506, 1515 (11th Cir. 1986). 'A defendant who argues that *Ashe* is applicable to his case carries the burden of establishing that the issue he seeks to foreclose from consideration in the second case was "necessarily" resolved in his favor in the prior proceeding. *United States* v. *Seijo*, 537 F.2d 694, 697 (2d Cir. 1976), cert. denied, 429 U.S. 1043, 97 S. Ct. 745, 50 L. Ed. 2d 756 (1977).' *United States* v. *Castro*,

629 F.2d 456, 465 (7th Cir. 1980). Furthermore, when a defendant is acquitted of conspiracy and then retried on the substantive offense, 'if it can be determined that the first jury must have determined an ultimate fact common to the conspiracy and substantive crimes in the defendant's favor, acquittal of conspiracy may prevent the government from introducing the evidence necessary to convict the defendant of the substantive offense in a subsequent trial.' *United States* v. *Bollinger*, 796 F.2d 1394, 1406 (11th Cir. 1986).

" 'The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon* v. *United States*, 332 U.S. 575, 579 [68 S. Ct. 237, 98 L. Ed. 180 (1948)]. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.' *Ashe* v. *Swenson*, supra, 444." *State* v. *Hope*, supra, 584–85.

In *Hope*, the state sought to prosecute the defendant for aiding and abetting murder after the defendant had been acquitted of conspiracy to commit capital felony murder and the lesser included offense of conspiracy to commit murder. We held that the trial court should have granted the defendant's motion to dismiss,

because in the earlier prosecution the jury had necessarily determined that the defendant lacked the specific intent that the victim be murdered. Because that same intent would have been an element essential to the prosecution for aiding and abetting murder, the state was collaterally estopped from proceeding with that prosecution. Id., 588–89.

The defendant here claims that, as in *Hope*, issues that the state would have to prove at retrial were necessarily resolved in her favor by the jury in the first trial. To evaluate this claim we must decide, first, whether *Ashe* v. *Swenson*, supra, applies when a jury acquits on one count in a multicount indictment and does not reach a verdict on another count. *Ashe* v. *Swenson*, supra, 443, held that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the parties in any *future* lawsuit." (Emphasis added.) *Ashe* involved two successive proceedings against the defendant, whereas here jeopardy continues to attach from the first trial; see 3 W. LaFave & J. Israel, Criminal Procedure (1984) p. 75; and the jury could permissibly have returned inconsistent verdicts in the first trial. See *United States* v. *Powell*, 469 U.S. 57, 68–69, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). It may, therefore, be argued that extending collateral estoppel to the context of a retrial on one or more counts of a multicount indictment cannot be reconciled with the rule that inconsistent verdicts are permissible. Moreover, because jeopardy continues, it is arguable that the second trial is not a "future lawsuit" for *Ashe* purposes. The United States Supreme Court has not addressed this issue, and it is is a question of first impression for this court.

Courts that have considered the issue have held "with virtual unanimity" that collateral estoppel bars the state from relitigating a question of fact that was deter-

mined in the defendant's favor by a partial verdict. *United States* v. *Mespoulede*, 597 F.2d 329, 336 (2d Cir. 1979); see *United States* v. *Frazier*, 880 F.2d 878, 882–83 (6th Cir. 1989), cert. denied sub nom. *DeBusk* v. *United States*, 493 U.S. 1083, 110 S. Ct. 1142, 107 L. Ed. 2d 1046 (1990); *United States* v. *Mespoulede*, supra, 336–37 (citing cases). We are persuaded by the reasoning of those cases.

"We tolerate inconsistencies in unified jury verdicts in criminal cases, not because of any singular virtue we attribute to inconsistency, but rather out of deference to the nature of the jury and the role it plays in our jurisprudence. There is no question but that a jury in a criminal trial has the power to render a verdict of acquittal that is wholly at odds with the law and the facts. . . . We recognize that the jury is in a sense the conscience of the community and can, for example, render a verdict to mitigate an overly severe punishment. . . . Similarly, in compromising in order to reach a unanimous verdict, a jury is often fulfilling its role as a cross-section of the community that it is supposed to represent. Occasional anomalies are the price of unanimity. . . .

"Internal inconsistency, then, is not an end in itself, and it would be irrational to expand gratuitously the judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach contradictory results. Allowing a second jury to reconsider the very issue upon which the defendant has prevailed . . . implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause." (Citations omitted; internal quotation marks omitted.) *United States* v. *Mespoulede*, supra, 336–37.

We, therefore, reach the merits of the defendant's claim. In order to do so, we must examine the evidence that was presented to the jury that led it to acquit the defendant of the charge of aiding Dennis Coleman in the murder of her mother but to disagree on the charge of her conspiring with Coleman for the same purpose.

A

The defendant and Coleman gave contradictory testimony concerning the events leading up to the murder of the defendant's mother, Joyce Aparo. Coleman testified that the defendant, for more than a year preceding the murder, had repeatedly begged him to kill her mother, and that they had planned the murder together in detail the night before he did it. The defendant testified that she had never made any such request, and that she had not known that the murder would take place.

Coleman's testimony was as follows. In 1986 and 1987, the defendant lived with her mother in Glastonbury. In June, 1986, Coleman, then eighteen years old, met and began dating the defendant, who was fifteen years old. During the summer of 1986, the defendant and Coleman began a sexual relationship. At that time, they discussed the defendant's unhappiness with her life at home with her mother, with whom she had a painfully difficult relationship. At first they discussed a plan whereby the defendant would leave her mother and Coleman would become her guardian, but this plan was abandoned when they discovered that the defendant would have to be sixteen years old in order to select her own guardian. The defendant then initiated a discussion with Coleman about killing her mother.

These discussions continued throughout the summer of 1986. At one point, Coleman and the defendant discussed a plan whereby the defendant would stab her mother and then claim self-defense. This plan was aban-

doned when the defendant decided that she could not go through with stabbing her mother herself. They then decided that the defendant would flick the lights of her house as a signal for Coleman, who lived nearby, to come over and kill the victim. The lights did flash, but Coleman did not enter the house.

Coleman's testimony with respect to this incident was supported by a letter written to him by the defendant at that time stating that "[p]romises are very nice but I was taught never to promise anything unless I had an intention of carrying it out," that "I told you that you wouldn't be able to," that "I didn't ask you this time. You offered," and "Don't promise freedom when you don't have the keys to the cage. It's not fair!" Coleman testified that he had discussed this letter with the defendant and had assured her that he would keep his promise to her.

On a subsequent occasion, while Coleman was visiting the Aparo home, the defendant told him that she was going to put some sleeping pills into a sandwich that she was making for her mother. Coleman did nothing to stop her. Joyce Aparo took one bite of the sandwich, but decided that the relish was bad and sent them out to buy new relish.[5]

The evidence included other letters that Coleman and the defendant had written to each other during that summer. In one letter, Coleman stated "[a]ny sacrifice I will make," "[s]oon—for you—I will give my soul to something black," and "[y]ou know I would kill for you." The defendant wrote to Coleman: "I will do whatever is necessary. It is a decided thing and I will do it even if you won't help me. It is just another thing to do on my 'priority list' & right now it has a very high

[5] The jury was instructed that they could only use the evidence of the sandwich incident as evidence of intent, but that they could not substitute it for the acts with which the defendant was charged.

billing." In the same letter, she also wrote, "[l]eave the logistics to me unless you want to help," and "[m]y God, do you realize what we're thinking?" In the last of the letters from the summer of 1986 that were introduced into evidence, the defendant stated that she knew they could not follow through on their plan. "Being realistic we both know we could never hurt my mom. I know I couldn't have stood by while someone else did." Thereafter, the conversations about killing Joyce Aparo tapered off. The defendant and Coleman continued to see each other on an almost daily basis until the spring of 1987.

In early May, 1987, the defendant began spending the weekends at the Rowayton home of her violin teacher, Albert Markov. When Coleman became upset about the effect of her absences on their relationship, the defendant explained that she was trying to get away from her mother. She also told Coleman that she was in love with Alex Markov, her teacher's son. Later in May, she suggested to Coleman that they should stop communicating for a month, and he agreed. When they next spoke in late June, she told Coleman that she had had sexual relations with Alex Markov, but that her relationship with Markov had become platonic. From July 7 to 14, she traveled with Alex Markov to Woodstock, New York. While there, she spoke with Coleman several times by telephone. He then believed that the defendant's relationship with Alex Markov was platonic, but he was suspicious. Coleman testified that his relationship with the defendant during this time was "stressful."

After the defendant's return from Woodstock, discussions about killing Joyce Aparo resumed. The defendant told Coleman that her mother was forcing her to stay in Rowayton and to continue her relationship with Markov. Toward the end of July, she told Coleman that she, her mother, Albert Markov and Alex

Markov would shortly be traveling to Binghamton, New York for three or four days. Two times during the week before the trip, the defendant spoke to Coleman through her bedroom window. During the first of these conversations, the defendant cried and demanded that her mother be killed soon because she could not stand it any more. During the second conversation, the defendant said that it had to be done before the trip, because she could not bear the thought of having to go on vacation with her mother and the Markovs. They then discussed killing Joyce Aparo by holding a rag saturated with bleach and ammonia over her face or by strangling her. They agreed that Coleman would come into the house that night, kill the victim, and carry away the body, and that the defendant would clean up and wipe away fingerprints afterward. Coleman lost his nerve, however, and did not go through with his part of the plan. The next day, shortly before leaving for Binghamton, the defendant telephoned Coleman. At first she was upset that he had not carried out the plan, but then became "more understanding," and told him that she would be home on August 4. She asked him to go to the Aparo home, to let himself in with a key she had previously given to him, and to feed her cats, which he agreed to do. They agreed to carry out the murder plan on August 5. During one of the visits to feed the cats, Coleman put a note between the sheets of the defendant's bed stating, "I will do the deed."

On August 4, the defendant, who had returned from Binghamton and was staying in Rowayton, spoke four times by telephone with Coleman. She first told him to kill her mother the following day after the victim had gone to bed, and then, in a later conversation, changed the plan, asking him to kill her mother that night while the defendant was still in Rowayton, because she did not want to be at home when it happened. In the third conversation, the defendant insisted

that the body be left where it could be found, so that the victim's life insurance would be paid to the defendant. During the last conversation, Coleman informed the defendant that a friend had agreed to help him.

At 1 a.m. on August 5, Coleman, accompanied by two friends, entered the Aparo home and strangled Joyce Aparo in her bed with a pair of pantyhose. Coleman and his two friends then took the body away in the victim's car, and abandoned the body and the car in Bernardston, Massachusetts.

Coleman's testimony was supported by that of two friends of the defendant. Shannon DuBois testified that on August 6, the defendant had told her that Coleman had committed the murder. The defendant had told DuBois that she and Coleman had discussed killing her mother on five different occasions, and that they had discussed a number of ways of committing the murder, including the use of chloroform, stabbing her mother, and cutting the brake lines of her mother's car. The defendant had also described the sandwich incident. The defendant had said that she had spoken with Coleman the night before the murder, and had not wanted to be there when it happened, but had planned to come back the next day, clean up the house, and call the police. Another friend, Jill Smith, testified that several months after the murder, the defendant had told Smith that Coleman had called her on the night of the murder, that he had been upset that she was not in Glastonbury, and that he had told her that he would kill her mother. The defendant had also told Smith that she had not thought that Coleman was serious, because on prior occasions he had said he would kill Joyce Aparo and had not followed through.

The state offered other evidence of actions by the defendant after Joyce Aparo's death that, it claimed, demonstrated her consciousness of guilt. Beverly

Warga, an administrative secretary at the police department, testified that on August 5, 1987, she had overheard a telephone conversation in which the defendant had asked, "Where did you do it? Did you hurt your head? Don't worry about it, I'll be there soon. I'll take care of you." Ann Marie Murray, who had been a coworker of Joyce Aparo's, testified that on August 6, 1987, the defendant had stated that she would be getting $300,000 from an insurance policy. There was evidence that the defendant had concealed evidence and had lied to the police about her knowledge that Coleman had committed the murder, and that she had had sexual relations with Coleman twice after he was arrested. On August 20, 1987, she wrote a letter to Coleman stating, "I really believe that we'll turn out O.K. Even if we both have to spend 25 years in jail."

The defendant, who testified on her own behalf, denied that she had requested or aided Coleman to kill her mother. She testified that her diary entries, which had been admitted into evidence and which stated that "Den & I have our plot" and "Update: Will not carry out plan," referred to her plan with Coleman to run away and get married. She testified that her "priority list" letter had also referred to her plan to run away.

She admitted that there had been a single actual discussion of killing her mother, and that this had led to the flicking of the lights incident. The discussion occurred after her mother had threatened to break up her relationship with Coleman, and she told Coleman that she wished her mother would die. He responded by suggesting that the defendant kill her mother and claim self-defense. When the defendant rejected this suggestion, he offered to do it himself by hiding in the house while they were away. The defendant then said that it would be better for him to be outside the house, and for her to signal him by flashing the lights. The idea was then dismissed as irrational. Later that day,

however, the defendant and her mother did go out, and when they returned, her mother accidentally flicked the lights off and on. This frightened the defendant, who locked the door and drew the curtains. The defendant acknowledged that two of her letters to Coleman had referred to this incident. She testified, however, that she had not intended to kill her mother.

The defendant admitted that, after one bitter argument after her mother had found a note discussing the defendant's plan to run away with Coleman, she had crushed two of her mother's Fiorinal tablets and put them in her mother's sandwich. Her intention, however, had been not to kill her mother, but only to calm her down.

After the defendant began spending time with Alex Markov in May, 1987, her relationship with her mother improved. During this same time, her relationship with Coleman began to dissolve, and after she began sleeping with Markov, she suggested to Coleman that they separate for a month so that she could work out her feelings. Several witnesses and her diary entries corroborated her testimony that her relationship with her mother had been improving during this time.

The defendant testified that she had lied to Coleman when she had said that she did not want to go to Binghamton and that her mother was forcing her to do so. She testified, and her diary indicated, that she had been looking forward to the trip and to going to parties with Markov. She had done this because she had not wanted Coleman to think that she "was voluntarily spending time with Alex" and because she "knew he was jealous."

In the August 4 telephone conversations, the defendant testified, she had not discussed killing her mother at all, but rather had telephoned Coleman to tell him that it would no longer be necessary for him to feed

the cats, because her mother had returned home. Coleman had been angry at her mother for making her stay in Rowayton and had said, "sometimes I just wish I could kill her."

In order to explain certain of her statements and actions, the defendant also presented evidence that she had been physically and emotionally abused by her mother. Numerous witnesses testified about the abuse, and reports were introduced that had been prepared by the Department of Children and Youth Services, which several times had investigated allegations of abuse, and by Norwalk Hospital, which had treated the defendant after a suicide attempt when she was twelve years old. Two psychiatrists, John Cegalis and Walter Borden, testified as expert witnesses on the defendant's behalf. Both opined that she fit the profile of an abused and battered child and suffered from post traumatic stress disorder. Cegalis testified that the defendant's expressions of desire for her mother's death did not indicate an intent to kill, but rather a fantasy that was normal in an abused child. Cegalis also said that the defendant's continuation of her relationship with Coleman, knowing that he had murdered her mother, was not abnormal for a battered child, because such children have a "morbid fear" of being rejected or abandoned. In light of her ambivalent feelings about her mother, Cegalis stated that "it would be understandable" for her to wish to hold onto, and even to try to protect, the one important person left in her life.

The defendant also presented evidence that Coleman had acted on his own in order to terminate the defendant's relationship with Markov, which Joyce Aparo had been encouraging. On cross-examination, Coleman admitted that he had been jealous of the defendant's relationships with other men, and that he had been depressed and upset as a consequence of her relationship with Markov. He testified that in late July, 1987,

when the defendant asked him what he would do if he knew that she and Markov had had sexual intercourse twenty times, "I told her that if that was true, I would drive off the road and kill us both." He said that on August 3, 1987, while he was in the Aparo home feeding the cats, he had become upset when he saw a pile of photographs of the defendant with Markov. He acknowledged that he had previously stated that he felt that it had been a situation of self-defense, in that it came down to Joyce Aparo or himself.

B

The defendant claims that the trial court improperly denied her motion to dismiss the conspiracy count on grounds of collateral estoppel. We do not agree.

In the present case, in order to acquit the defendant of being an accessory to murder, the jury would have had to find either that (1) she did not intend that her mother be killed, or (2) she did not solicit, request, command, importune, or intentionally aid Coleman to commit the murder, or (3) both.[6] On the other hand, in order

[6] The defendant, noting that the trial court, over her objection, instructed the jury that it had to find that "she intended to aid, assist *or join* Dennis Coleman in the commission of the murder of her mother," (emphasis added) claims that this instruction collapsed the distinction between the accessory and conspiracy statutes, so that acquittal of one necessarily implied acquittal of the other. The defendant argues that, because the ordinary meaning of "join" is "agree," and because agreement is the only element of conspiracy that will be an issue in the new trial (Joyce Aparo's death making the existence of an overt act indisputable), the jury necessarily found that the defendant did not conspire with Coleman.

Taken in context, however, the court's instruction does not support the defendant's argument. The court stated: "There are three elements the State must prove beyond a reasonable doubt in order to warrant a conviction: First, the defendant intended to cause the death of her mother; second, with the intent to cause her mother's death, she solicited, requested, commanded, importuned or intentionally aided Dennis Coleman to cause her mother's death; and, third, acting with these intentions, she intended to aid, assist or join Dennis Coleman in the commission of the murder of her mother." The defendant correctly noted that the third of these elements

for the jury on retrial to convict the defendant of conspiracy, "it must be shown that an agreement was made between two or more persons to engage in conduct constituting a crime and that the agreement was followed by an overt act in furtherance of the conspiracy by any one of the conspirators. The state must also show intent on the part of the accused that conduct constituting a crime be performed. . . . Further, the prosecution must show both that the conspirators intended to agree and that they intended to commit the elements of the underlying offense." (Citation omitted; internal quotation marks omitted.) *State* v. *Lewis*, 220 Conn. 602, 606–607, 600 A.2d 1330 (1991).

The defendant claims that, because it is undisputed that she aided Coleman by telling him that the victim was home alone, the verdict of acquittal demonstrates that the jury necessarily found that she did not have the intent to kill her mother. Since the state would have to prove such an intent in order to convict her of conspiracy, she contends, collateral estoppel bars a retrial on that charge. We do not agree.

"We have previously stated that a conviction under § 53a-8 requires proof of a dual intent, i.e., that the accessory have the intent to aid the principal and that in so aiding he intend to commit the offense with which he is charged." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Foster*, 202 Conn. 520, 525–26, 522 A.2d 277 (1987). Accessorial liability "is designed

was not in the statute. As given, however, this instruction clearly separates the question of the defendant's intent to join Coleman from that of whether she solicited, requested, commanded, importuned, or intentionally aided Coleman to commit the murder. The jury was not told that its resolution of the former question would answer the latter as well. On the contrary, the court stated that "if you find that the State has failed to prove any one of these elements to you beyond a reasonable doubt, you must find the defendant not guilty." The instruction, although incorrect, did not weaken the state's burden of proving accessorial acts and did not permit the jury to substitute a conspiracy for such acts.

to punish one who intentionally aids another in the commission of a crime and not one whose innocent acts in fact aid one who commits an offense." Id., 531.

Although the defendant concededly told Coleman that her mother was home on the night of the murder, the jury could reasonably have found, on the basis of either Coleman's or the defendant's testimony, that although she may have wanted to kill her mother, she did not make *this* statement with the intention that it result in her mother's death. According to the defendant, the reason she told Coleman that her mother was home was to indicate that it would no longer be necessary for him to go to the house to feed the cats. Coleman testified that the defendant had told him, during their first conversation on August 4, either that her mother was home alone or that her mother was coming home. At the time of that conversation, according to Coleman, the defendant's plan was for her mother to be killed the following night. By that time, the information that Joyce Aparo was home alone on August 4 would obviously have become too stale to be useful in the commission of the crime. Only in a later conversation did the defendant change the plan and ask him to kill her mother that night. Thus, even if the jury believed Coleman's account, it might have concluded that at the time the defendant told him her mother was or would be home alone, she did not know that this information would aid him in the commission of the murder. The aid would then have been analogous to the defendant's act in giving Coleman the key that he used to enter the house the night of the murder. Coleman testified on cross-examination that she had done this a number of months before, and had not done so for the purpose of helping him to kill her mother.

Given the numerous conflicts between the defendant's and Coleman's testimony, the jury could have chosen to disbelieve all or part of the latter. The jury might

reasonably have concluded that Coleman was untrustworthy because he was jealous of the defendant's relationships with other men and was angry at the defendant for his present predicament, and because he desired to shorten his prison sentence by currying favor with the authorities. The jury therefore might, for example, have decided to believe only those portions of his testimony that were corroborated by DuBois and Smith, both of whom testified that the defendant had admitted discussing the murder with Coleman shortly before he killed Joyce Aparo, but neither of whom testified that the defendant had requested Coleman to do so. Mere knowledge that a crime is going to be committed is not sufficient to establish liability as an accessory if the defendant does not encourage or intentionally aid in the commission of the crime. See *State* v. *Wakefield*, 88 Conn. 164, 172–73, 90 A. 230 (1914). The jury's conclusion that there was a reasonable doubt as to whether the defendant had solicited, requested, commanded, importuned, or intentionally aided Coleman would, therefore, not be inconsistent with the conclusion that the defendant had entered into a conspiracy to commit murder.[7] We conclude, therefore, that the principle of collateral estoppel does not bar the state from retrying the defendant for conspiracy to commit murder.

C

Finally, the defendant claims that much of the evidence that the state relied upon in the first case must be excluded from a retrial on the basis of collateral estoppel, and that the evidence that remains is insufficient to justify placing her on trial a second time, at least in the adult division of Superior Court. Specifi-

[7] The question of whether the evidence was sufficient to support a conviction for conspiracy has not been briefed or argued, and nothing in this opinion should be understood to prejudge this issue, which is likely to arise again on retrial.

cally, the defendant claims that the acquittal on the charge of being an accessory to murder shows that the jury necessarily disbelieved all the state's evidence regarding her activities and her state of mind from July 14 to August 5, 1987, the period during which the information charged that she had been an accessory. Therefore, she contends, the state may introduce into evidence only the conversations she had with Coleman during the summer of 1986, when she was fifteen years old.[8] She further asserts that General Statutes § 46b-121 assigns to the Juvenile Matters of the Family Division of the Superior Court exclusive original jurisdiction over children under sixteen years of age who commit delinquent acts, and that the information therefore must be dismissed for lack of jurisdiction or, in the alternative, that the case should be transferred to the Juvenile Matters docket.

This argument fails at its first juncture. As we have already noted, the defendant's acquittal on the charge of being an accessory to murder does not necessarily indicate that the jury disbelieved all of the state's evidence of her conduct after she turned sixteen years old. On the contrary, the jury could have reached the result it did if it believed every piece of that evidence except those parts of Coleman's testimony that directly indicated that the defendant had solicited, requested, commanded, importuned, or intentionally aided him in the murder of Joyce Aparo.

The trial court, however, rejected all of the defendant's collateral estoppel claims and refused to limit in any way the evidence that the state could introduce at the second trial. "[T]he state is not barred from putting Dennis Coleman or any other witness who testified in the first trial on the witness stand in the second trial. An acquittal on the First Count does not neces-

[8] The defendant turned sixteen on February 12, 1987.

sarily mean that the jury rejected any witness' testimony in toto." We agree with the last sentence just quoted, but disagree with the conclusion that Coleman's testimony will, therefore, be admissible in its entirety.

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson*, supra, 443. "In a criminal context, the doctrine prohibits the government from forcing a defendant to defend against charges or allegations which he overcame in an earlier trial." *United States* v. *Gornto*, 792 F.2d 1028, 1031 (11th Cir. 1986). "For estoppel to apply, the fact sought to be foreclosed by [the] defendant must necessarily have been determined in his favor in the prior trial; it is not enough that the fact *may* have been determined in the former trial." (Emphasis in original.) *United States* v. *Irvin*, supra, 1515. The defendant has the burden of showing "that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling* v. *United States*, 493 U.S. 342, 350, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990); see id., 350–51.

The state maintains that *Dowling* v. *United States*, supra, establishes that a prior acquittal does not automatically preclude the state from using evidence presented in the first trial. *Dowling* held that, under the facts there presented, collateral estoppel did not bar the introduction of evidence of a crime that the defendant had previously been acquitted of committing. Dowling was first tried and acquitted for robbery A. Thereafter, he was prosecuted for robbery B, which (unlike the two robberies for which the defendant was successively tried in *Ashe* v. *Swenson*, supra) occurred at a different time and place. In that trial, evidence of his conduct in committing robbery A was offered to prove his identity as the perpetrator of robbery B: in

both robberies, the perpetrator had worn a ski mask, had carried a small pistol, and had been accompanied by a man named Delroy Christian. The court held that this did not constitute double jeopardy, noting that, "unlike the situation in *Ashe* v. *Swenson*, the prior acquittal did not determine an ultimate issue in the present case." *Dowling* v. *United States*, supra, 348. The court noted that, under the relevant rule of evidence, a similar act by the defendant is relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor. Id. Because the second trial did not require the state to prove Dowling's participation in robbery A beyond a reasonable doubt, the doctrine of collateral estoppel was inapplicable. Id., 348–50. Moreover, an examination of the record revealed that the acquittal did not necessarily represent a jury determination that the defendant had not been one of the masked men who had participated in robbery A. Id., 350–52.

Whether it is *Ashe* or *Dowling* that controls the admissibility of evidence in a case such as this depends on whether, as a general matter, the prosecution on retrial "may constitutionally rely on the same evidence or even the same theory relied upon in a former proceeding as long as the prosecution also presents an alternative—some other evidence or theory—on which the jury may base its verdict." A. Poulin, "Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal," 58 U. Cin. L. Rev. 1, 12 (1989) (hereinafter "Collateral Estoppel"). The answer to that question depends on how the line is drawn between proof of ultimate facts and proof of predicate or evidentiary facts. Evidence of predicate facts, rather than ultimate facts, need not be proven beyond a reasonable doubt; *State* v. *Williams*, 220 Conn. 385, 398, 599 A.2d 1053 (1991); and is, therefore, not barred by collateral estoppel.

Where evidence of a crime of which the defendant has previously been acquitted is sufficient, but not necessary, to prove an ultimate fact in a later trial, it is in theory possible for the jury to use that evidence only to cast light on other facts not previously litigated, and to use those other facts as the primary basis of conviction. In that case, the crime previously tried would only be a predicate fact.[9] It is, however, equally possible that the second jury will convict the defendant solely on the basis of conduct that the first jury had found not to be proven beyond a reasonable doubt.[10] In such cases, "the close relationship between the charged offense and the acquitted offense creates a risk that

[9] If all proof of ultimate facts could thus be transformed by hypothesis into proof of evidentiary facts, then the doctrine of collateral estoppel would be inapplicable in any case in which a retrial was permissible, and thus would never act to bar evidence. See A. Poulin, "Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal," 58 U. Cin. L. Rev. 1, 8–9 (1989). *Dowling* v. *United States*, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990), does not suggest, however, that the court intended to discard the well established rule that collateral estoppel may exclude evidence in certain cases; see id., passim; annot., "Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of that Offense," 25 A.L.R.4th 934 (1983 & Sup. 1991); and courts have continued to apply that rule after *Dowling*. See, e.g., *United States* v. *Seley*, 957 F.2d 717, 722 (9th Cir. 1992); *United States* v. *Blackwell*, 900 F.2d 742, 745–46 (4th Cir. 1990); *Maryland* v. *Baxter*, 92 Md. App. 213, 607 A.2d 120 (1992); *Eatherton* v. *Wyoming*, 810 P.2d 93 (Wyo. 1991).

[10] No jury charge can be crafted that would permit the jury to use the challenged evidence for the permissible purpose while preventing the jury from using it for the impermissible purpose. Even the best intentioned jury probably could not follow such an instruction. Ordinary experience teaches us that once a person has arrived at a belief, that person will often be hard put to say which evidence was determinative in forming that belief and which evidence was merely helpful. Once the evidence is admitted, therefore, a risk exists, which court and jury alike are powerless to prevent, that the defendant's constitutional rights will be violated. We note that limiting instructions have been held to be inadequate where the jury has heard and been told to disregard compelling evidence of the defendant's guilt that was constitutionally inadmissible. See, e.g., *Bruton* v. *United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (codefendant's confession admitted only against codefendant); *Jackson* v. *Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) (allegedly involuntary confession).

the jury will convict the defendant because the jury concludes beyond a reasonable doubt that the defendant committed the criminal conduct of which the prior jury acquitted the defendant. Collateral estoppel should protect the defendant against that risk . . . ." A. Poulin, "Collateral Estoppel," supra, 23. We conclude that evidence of crimes of which the defendant has previously been acquitted, and concerning which the prior jury demonstrably harbored a reasonable doubt, should be excluded when it "would establish an element of the charged offense and could therefore form the basis of the conviction . . . ." A. Poulin, "Collateral Estoppel," supra, 33; see *Maryland* v. *Baxter*, 92 Md. App. 213, 607 A.2d 120, 123 (1992); *Eatherton* v. *Wyoming*, 810 P.2d 93, 103-104 (Wyo. 1991).

In the case now before us, at least some of the evidence that, if believed, would have established the defendant's guilt of being an accessory to murder, would also have established that, intending that the crime of murder be performed, she entered into a conspiracy with Coleman. "In *Dowling*, the prior crime evidence was relevant to an essential element but would not itself, if proved, establish that essential element." A. Poulin, "Double Jeopardy: *Grady* and *Dowling* Stir the Muddy Waters," 43 Rutgers L. Rev. 889, 906 (1991). In this case, however, like *Ashe* and unlike *Dowling*, the prior acquittal indicates that the jury necessarily rejected some evidence that, if believed, could establish essential elements of conspiracy, specifically agreement, intent to agree, and intent to kill. For example, Coleman testified that during the August 4 telephone conversations, the defendant first told him to kill her mother the following day after the victim had gone to bed, and then, in a later conversation, changed the plan, asking him to kill her mother that night while the defendant was still in Rowayton, because she did not want to be at home when it hap-

pened. Assuming, as we are required to do, that the jury complied with the court's instructions, its acquittal on the accessory charge requires the conclusion that it found that these alleged facts had not been proven beyond a reasonable doubt.[11] "Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that [the defendant had made those statements], the State could not present the same or different . . . evidence in a second prosecution . . . in the hope that a different jury might find that evidence more convincing." *Ashe* v. *Swenson*, supra, 446.

The trial court's conclusion that no evidence should be excluded must, therefore, be reconsidered in light of the test we have articulated today. That test clearly indicates that the state may not introduce Coleman's testimony that the defendant requested, on the night before the murder took place, that Coleman kill her mother. The jury in the first trial demonstrably harbored a reasonable doubt as to the truth of that alleged fact and, if that fact were found to be proven beyond a reasonable doubt by the jury in the second trial, it would establish an element of the charged offense of conspiracy and could, therefore, form the basis of a conviction. With respect to other facts that the state may seek to prove, it would not be appropriate, on the present record, for us to anticipate evidentiary rulings on retrial. The trial court must exclude evidence offered in the first trial if (1) it can be demonstrated that the jury, in acquitting the defendant of the accessory count

[11] The state, noting that accessorial liability is in most cases based on physical acts, contends that the jury may have believed Coleman, "but nevertheless concluded that the defendant's verbal acts did not rise to the level of accessorial liability needed for conviction of murder." Inasmuch as four of the five accessorial acts specified in General Statutes § 53a-8—soliciting, requesting, commanding, or importuning—are necessarily verbal acts, we think that the jury could not have reached such a conclusion without disobeying its instructions and nullifying the statute.

in the first trial, harbored a reasonable doubt as to the truth of the fact sought to be proven, and (2) the alleged fact, if proven, would establish an element of the offense of conspiracy and could, therefore, form the basis of a conviction on that count.

The decision of the trial court is affirmed in part and reversed in part, and the case is remanded to the trial court for further proceedings consistent with this opinion.

In this opinion the other justices concurred.

Supreme Court, U.S.
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No. 92-1067

In The

Supreme Court of the United States

October Term, 1992

STATE OF CONNECTICUT,

Petitioner

v.

KARIN APARO,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION (WITH ATTACHED APPENDICES)

HUBERT J. SANTOS
Counsel of Record
SANTOS, PECK & SMITH, P.C.
51 Russ Street
Hartford, CT 06106
(203) 249-6548

HOPE C. SEELEY
SANTOS, PECK & SMITH, P.C.
51 Russ Street
Hartford, CT 06106

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF CONNECTICUT, Petitioner

v.

KARIN APARO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

The Respondent, Karin Aparo, respectfully requests that this Court deny the petitioner for a writ of certiorari seeking review of the Connecticut Supreme Court's decision in *State of Connecticut v. Karin Aparo*, 223 Conn. 384, 614 A.2d 401 (1992) (*see* Petitioner's Appendix, 1A-28A, hereinafter "Pet. App. __").

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 223 Conn. 384, 614 A.2d 401 (1992) and is reprinted in Petitioner's Appendix at 1A-28A.

STATEMENT OF THE CASE

The respondent, Karin Aparo, who was sixteen at the time of her arrest, was charged with one count of murder as an accessory in violation of Connecticut General Statutes §§ 53a-54a(a) and 53a-8, and one count of conspiracy to commit murder in violation of Connecticut General Statutes §§ 53a-48(a) and 53a-54a(a). *State v. Aparo*, 223 Conn. 384, 385-6 (1992) (Pet. App. 2A-3A). A jury of twelve acquitted her of the accessory charge but could not reach a verdict on the conspiracy charge. After the trial court declared a mistrial on the conspiracy count, the state announced its intention to retry the respondent on that count. *Id.*, 223 Conn. at 386 (Pet. App. at 3A).

The respondent filed a motion to dismiss all pending charges. Upon the trial court's denial of this motion, the respondent took an interlocutory appeal, raising three issues: (1) principles of double jeopardy preclude retrial when six out of twelve jurors vote for acquittal; (2) principles of collateral estoppel preclude retrial because the jury necessarily found that she had never intended that her mother be killed; and (3) principles of collateral estoppel require the exclusion of certain evidence, leaving insufficient admissible evidence to warrant a retrial. *Id.*

The Connecticut Supreme Court rejected the first and second of these claims, but it accepted the third claim in part. *Id.*, at 387 (Pet. App. at 4A).

The Petitioner challenges the Connecticut Supreme Court's decision on two grounds: (1) that it was error to apply collateral estoppel to a case of continuing jeopardy;[1] and, (2) that it was error to preclude the reuse of evidentiary facts.

In its decision, the Connecticut Supreme Court discussed at length whether or not the principle of collateral estoppel, as enunciated in *Ashe v. Swenson*, 397 U.S. 436 (1970), applied when a jury acquits on one count of a multicount indictment and does not reach a verdict on another count. *See Aparo*, 223 Conn. at 391 (Pet. App. at 8A-9A).

The Connecticut Supreme Court, relying upon decisions from the federal circuit courts,[2] concluded that collateral estoppel bars the state from relitigating a question of ultimate fact that was determined in the respondent's favor by a partial verdict. *Id.*, at 388-93 (Pet. App. at 5A-10A). In reaching its conclusion, the Connecticut Supreme Court quoted from *United States v. Mespoulede*, 587 F.2d 329, 336-7 (2d Cir. 1979):

> We tolerate inconsistencies in unified jury verdicts in criminal cases, not because of any singular virtue

---

[1] The Petitioner did not raise this claim on appeal; rather, after the Connecticut Supreme Court issued its decision, the Petitioner raised this issue in its Motion to Reconsider.

[2] The Court was persuaded by the reasoning in *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979) (citing cases); and, *United States v. Frazier*, 880 F.2d 878 (6th Cir. 1989, *cert. denied sub nom. DeBusk v. United States*, 493 U.S. 1083 (1990).

> we attribute to inconsistency, but rather out of deference to the nature of the jury and the role it plays in our jurisprudence. There is no question but that a jury in a criminal trial has the power to render a verdict of acquittal that is wholly at odds with the law and the facts. . . . We recognize that the jury is in a sense the conscience of the community and can, for example, render a verdict to mitigate an overly severe punishment. . . . Similarly, in compromising in order to reach a unanimous verdict, a jury is often fulfilling its role as a cross-section of the community that it supposed to represent. Occasional anomalies are the price of unanimity. . . .
>
> Internal inconsistency, then, is not an end in itself, and it would be irrational to expand gratuitously the judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach contradictory results. Allowing a second jury to reconsider the very issue upon which the defendant has prevailed . . . implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the same ordeal of multiple trials, that lie at the heart of the double jeopardy clause.

Id., at 392 (Pet. App. at 9A).

Thus, the Connecticut Supreme Court reached the merits of the respondent's claims and affirmed the trial court's decision that collateral estoppel did not act as a complete bar to retrial. *Aparo*, 223 Conn. at 387-8, 401-4 (Pet. App. at 18A-21A).

However, the Connecticut Supreme Court reversed the trial court's decision that no evidence should be excluded at a retrial and held that "evidence of crimes of which the defendant has previously been acquitted, and concerning which the prior jury demonstrably harbored a reasonable doubt, should be excluded when it would establish an element of the charged offense and could therefore form the basis of the conviction." *Id.* at 409 (citations omitted) (Pet. App. at 26A).

The court further noted that "the prior acquittal indicates that the jury necessarily rejected some evidence that, if believed, could establish essential elements of conspiracy, specifically agreement, intent to agree, and intent to kill." *Id.* In particular, the court determined that the state may not introduce Coleman's testimony that the respondent requested, on the night before the murder took place, that Coleman kill her mother. *Id.*, at 410 (Pet. App. at 27A).

REASONS FOR DENYING THE WRIT

I. The Petitioner Does Not Raise A Substantial Federal Claim Worthy Of This Court's Review Because It Was Not Presented Below And The Connecticut Supreme Court Properly Applied The Principle Of Collateral Estoppel To The Case At Bar In Accordance With Established Law.

A. The Petitioner Is Precluded From Challenging The Connecticut Supreme Court's Application Of The Principle Of Collateral Estoppel To The Case At Bar Since The Petitioner Failed To Press This Issue Below.

The petitioner never raised the issue of whether the principle of collateral estoppel is applicable in a situation where the jury had acquitted on one charge and failed to reach a verdict on another charge either in the trial court or before the Connecticut Supreme Court. "[I]t is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *Illinois v. Gates*, 462 U.S. 213, 218 (1983) (quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-5 (1940)).

While the Connecticut Supreme Court passed upon this issue in its decision, the petitioner never raised it, and therefore, it is not entitled to raise it now. *See Gates*, 462 U.S. at 217-24. (no reason to treat the state's failure to

have challenged an asserted federal claim differently from the failure of the proponent of federal claim to have raised that claim). Accordingly, this Petition must be denied.

B. Since The Jury's Verdict Of Acquittal On The Murder Count Represents A Valid And Final Judgment, The Connecticut Supreme Court Properly Applied The Principle Of Collateral Estoppel To The Case At Bar In Accordance With Established Law.

The Connecticut Supreme Court, relying upon *Ashe v. Swenson*, 397 U.S. 436 (1970), properly recognized that whenever an issue of ultimate fact has once been determined by a *valid and final judgment*, that issue cannot be litigated between the same parties in any future lawsuit. *Aparo*, 223 Conn. at 389 (quoting *Ashe v. Swenson*, 397 U.S. at 443) (Pet. App. at 6A). Therefore, it properly applied the principle of collateral estoppel to the case at bar since the jury's verdict of acquittal on the murder count represented "a valid and final judgment."

In *Ashe v. Swenson*, this Court defined collateral estoppel as follows:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

> ... the rule of collateral estoppel is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

Ashe v. Swenson, 397 U.S. at 443-4.

The petitioner's argument that collateral estoppel is inapplicable to a mistried count at a retrial is inapposite to *Ashe v. Swenson*. Since the determination of whether collateral estoppel is applicable is based upon the previous judgment of acquittal, it would make no sense to apply it to a successive prosecution case, but not on a mistried count at a retrial.

The primary purpose of the doctrine of collateral estoppel is to protect an accused from the unfairness of being required to relitigate an issue which has been once determined in his favor by a verdict of acquittal. *See Ashe*,

397 U.S. at 446 (it "protects a man who has been acquitted from having to 'run the gauntlet' a second time"). The Court of Appeals for the Second Circuit in *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979), noted that "... once a defendant has satisfied one jury that he is not guilty of a crime, constitutionally-rooted considerations of fairness preclude the Government from injecting any issues necessarily decided in his favor into a second trial for another offense." *Mespoulede*, 597 F.2d at 330.

In *Mespoulede*, the Second Circuit held that collateral estoppel bars the Government from relitigating a question of fact that was determined in the defendant's favor by a partial verdict. *Id.*, at 336-7. In that case, the defendant was charged in a two count indictment with conspiracy to distribute cocaine and with possessing cocaine with the intent to distribute. *Id.*, at 330. The jury acquitted the defendant on the possession count, but it failed to reach a verdict on the conspiracy count. *Id.*, at 332. At retrial on the conspiracy count, the trial court denied the defendant's motion to bar the Government from introducing evidence that he possessed cocaine.

The Second Circuit reversed, stating that since evidence of possession was introduced to persuade the second jury of the same fact already litigated and resolved in the defendant's favor, it would be "inequitable" to refuse the assertion of collateral estoppel. *Id.*, at 335. The court further noted:

> Allowing a second jury to reconsider the very issue upon which the defendant has prevailed serves no valuable function. To the contrary, it implicates concerns about the injustice of exposing a defendant

> to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause.

Id., at 336-7.

Therefore, the Connecticut Supreme Court properly applied the principle of collateral estoppel to the conspiracy count because the jury's verdict of acquittal on the murder count was a valid and final judgment.

The petitioner argued that the continuing jeopardy principle should preclude application of collateral estoppel in the acquittal-deadlock-retrial scenario and analogized it to the circumstances of *Price v. Georgia*, 398 U.S. 323 (1970). *See* Petitioner's Petition at 13-4. However, such an analogy is not warranted. In *Price*, the jury had acquitted the defendant of murder and convicted him of the lesser included offense of voluntary manslaughter. 398 U.S. at 324. After the conviction was reversed on appeal, the defendant was again placed on trial under the original murder charge. The second jury also convicted him of voluntary manslaughter. This Court held that because the defendant sought and obtained the reversal of his initial conviction by taking an appeal, double jeopardy did not prevent a retrial for that crime. *Id.*, at 326-7. However, this Court also held that double jeopardy required that the retrial be limited to that lesser offense, and therefore, reversed his conviction. *Id.*, at 327-32.

There is no analogy between *Price* and the case at hand. In *Price*, the defendant was acquitted of murder and convicted on the lesser included offense of voluntary manslaughter. By appealing his conviction, he waived any

claim of double jeopardy on a retrial for that offense. In the instant matter, the respondent has not waived her constitutional claim against being required to relitigate an issue which has been once determined in her favor by a verdict of acquittal. The jury acquitted her on the charge of murder and could not reach a verdict on the charge of conspiracy to commit murder. It is the respondent's position that based upon the acquittal on the murder charge, the jury necessarily found in her favor on an element that the petitioner will have to prove at the retrial. Therefore, the respondent will be litigating a second time at least one factual issue that has previously been decided in her favor. Accordingly, there is nothing to be gained by comparing the case at hand with this Court's decision in *Price v. Georgia*.

The petitioner also argued that the respondent should not be allowed to assert collateral estoppel on retrial because "the second trial is the result of a neutral occurrence" -- jury deadlock as opposed to prosecutorial abuse. However, the respondent does not agree that the second trial is the result of a neutral occurrence; rather the respondent submits that the jury deadlock was caused by aberrant judicial procedure. Specifically, when all the circumstances of the proceedings below are examined, it is clear that the jury was unable to reach a verdict on the conspiracy count[3] due to the confusing instructions it

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[3] The conspiracy count is unique in that the petitioner charged the crime of conspiracy in two subsections with the time frame being the only difference between them. Subsection (a) alleged a conspiracy that began in the summer of 1986 when the respondent was fifteen years old and ended on August 5, 1987 when the she was sixteen while subsection (b) alleged the same time frame as alleged

received from the trial court. The court initially noted the following:

> I've just given you one instruction on the two parts of the count of conspiracy. However, it applies to both parts, so you must consider both each part separately and make a finding as to each part separately.
>
> .....
>
> As to the second count, each part will be read separately, so the clerk will read part (a), and then ask how did the jury find the defendant, guilty or not

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in the substantive murder count; that is, a conspiracy for an approximately two-week time period directly prior to the murder when the respondent was sixteen years old. The conspiracy count charged two subcounts as follows:

> a) at or near the town of Glastonbury, Connecticut on divers dates between August 1986 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY; and
>
> b) at or near the town of Glastonbury, Connecticut on divers dates between July 14, 1987 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY.

See Respondent's Appendix 2A.

guilty . . . and then the second part will be read, and, likewise, the foreperson will be asked.

See Respondent's Appendix at 3A.

However, after eight days of deliberations, the trial court reinstructed the jury on the conspiracy count. On the day before the jury announced that it was deadlocked on the conspiracy count, the jury requested "to rehear [the court's] instructions regarding the distinction between count two conspiracy charges (a) and (b)." *See* Respondent's Appendix 4A. The court responded by charging: "the distinction is only one of semantics, because if you were to find the elements of either (a) or (b), you would necessarily find all of the elements of the other." *See* Respondent's Appendix 4A.

This instruction, in conjunction with the earlier instruction, was ambiguous and confusing and could account for the jury's inability to reach a verdict on that count. Therefore, the petitioner's argument that the second trial was the result of a neutral occurrence is without merit.

The petitioner's claim that the Connecticut Supreme Court's application of collateral estoppel to a mistried count conflicts with this Court's recent pronouncements on double jeopardy law in *United States v. Felix*, ___ U.S. ___, 112 S. Ct. 1377 (1992), fails to recognize that the protection afforded a defendant by the collateral estoppel

principles in *Ashe v. Swenson* is separate and distinct from that accorded by the traditional *Blockburger* line of cases.[4]

In *Felix*, the defendant was convicted in Missouri on the crime of attempting to manufacture drugs. In order to establish the defendant's intent, the government had introduced evidence that he had manufactured drugs in Oklahoma. *Felix*, 112 S. Ct. at 1379-81.

Subsequently, he was charged with both conspiracy and the substantive counts in Oklahoma in relation to his manufacturing activities there. Two of the overt acts supporting the conspiracy charge were based on the same conduct that had been the subject of the Missouri prosecution. *Id.*

At the trial in Oklahoma, the government introduced much of the same evidence from the Missouri and Oklahoma transactions that had been introduced in the Missouri trial. The defendant was convicted, but the Tenth Circuit reversed most of the counts on which he had been found guilty on the ground that trial on these counts constituted double jeopardy in violation of the Fifth Amendment. *Id.*

This Court reversed the Tenth Circuit and held that prosecution of a defendant for conspiracy, where certain of

---

[4] "Collateral estoppel is distinct from double jeopardy in the sense that the traditional bar of double jeopardy prohibits the prosecution of the crime itself, whereas collateral estoppel, in a more modest fashion, simply forbids the government from relitigating certain facts in order to establish the fact of the crime." *United States v. Mulherin*, 710 F.2d 731 (11th Cir. 1983).

the overt acts relied upon by the Government are based upon substantive offenses for which the defendant has been previously convicted, does not violate the double jeopardy clause. *Id.*, at 1380. This Court stated:

> The actual crimes charged in each case were different in both time and place; there was absolutely no common conduct linking the alleged offenses. In short, none of the offenses for which Felix was prosecuted in the Oklahoma indictment is in any sense the "same offense" as the offense for which he was prosecuted in Missouri.

Id., at 1382. This Court further noted that "a mere overlap in proof between two prosecutions does not establish a double jeopardy violation." *Id.*

Felix was not a collateral estoppel case, but a traditional double jeopardy case that clarified this Court's holding in *Grady v. Corbin*, 495 U.S. 508 (1990). Collateral estoppel analysis, which focuses upon a valid and final judgment of acquittal, is different than traditional double jeopardy analysis. Since this Court's decision in *Felix* did not overrule *Ashe v. Swenson*, the Connecticut Supreme Court's application of collateral estoppel to the case at bar, where the respondent was acquitted of a charge, does not conflict with this Court's recent pronouncements on double jeopardy law.

The petitioner also argued that collateral estoppel should not apply where the state tried both counts simultaneously and pointed to dicta from this Court's decision in *Ohio v. Johnson*, 467 U.S. 493 (1984). *See*

Petitioner's Petition at 15. However, the instant case is distinguishable from *Ohio v. Johnson*.

In *Johnson*, the defendant was charged with murder, involuntary manslaughter, grand theft and aggravated robbery. After the defendant pled guilty to the lesser offenses of involuntary manslaughter and grand theft, the trial court dismissed the remaining counts on the ground that further prosecution was barred by double jeopardy. *Johnson*, 467 U.S. at 494. The United States Supreme Court reversed and held that prosecuting the defendant on the two remaining charges would not constitute the type of "multiple prosecution" prohibited by the double jeopardy clause because he "has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the State had the opportunity to marshall its evidence and resources more than once ..." . *Id.*, at 494, 501.

In a footnote, this Court addressed the defendant's argument that collateral estoppel bars prosecution on the remaining charges. This Court stated that "...the taking of a guilty plea is not the same as an adjudication on the merits after full trial, such as took place in *Ashe v. Swenson*." *Id.*, at 500 n.9.

The case at bar is easily distinguishable from *Ohio v. Johnson* in that because like in *Ashe*, there was an adjudication on the merits: the jury's verdict of acquittal on the charge of murder represents a final judgment which constitutes a valid determination of issues of ultimate fact. Just because the jury failed to reach a verdict on the conspiracy count does not make the validity of the determination of acquittal on the murder count questionable. Rather, based upon the final judgment of the

acquittal, to permit a second jury to reconsider the very issue of ultimate fact upon which the Defendant prevailed implicates fundamental constitutional concerns of fair play.

In *dicta*, this Court stated: "Moreover, in a case such as this, where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Id.*, at 500 n.9. The petitioner argued that this indicates that *Ashe* was never intended to apply to cases where the state tried both counts simultaneously and the jury acquitted on one count and hung on the other.

However, such an interpretation ignores the rationale of collateral estoppel which is that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. While *Ashe* made reference to "any future lawsuit," it did not limit its holding to successive prosecutions. Instead, in order to effectuate the purpose of collateral estoppel, the analysis should focus on whether an issue of ultimate fact has been determined by a valid and final judgment from a prior proceeding regardless of whether or not the present proceeding is a successive prosecution.[5]

---

[5] The overwhelming majority of the case law supports the application of the doctrine of collateral estoppel to the situation where a defendant is acquitted on one count and the jury failed to reach a verdict on another count. *See, e.g., United States v. Citron*, 853 F.2d 1055, 1059 (2d Cir. 1988); *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979); *United States v. Frazier*, 880 F.2d 878 (6th Cir. 1989), *cert. denied sub nom. DeBusk v. United States*,

Finally, the petitioner claimed that collateral estoppel should have no effect because the acquittal-deadlock situation is analogous to inconsistent verdicts wherein this Court has held that collateral estoppel has no application to the inconsistent verdict situation. *See* Petitioner's Petition at 15-6. Certainly, inconsistent verdicts are tolerated, *see, e.g., United States v. Powell*, 469 U.S. 57 (1984); *Dunn v. United States*, 284 U.S. 390 (1932), but "it hardly follows from the fact that a single jury in one trial is allowed to render inconsistent verdicts that a *second* jury in a *second* trial should be permitted to rely on the evidence rejected by the first." *United States v. Mespoulede*, 597 F.2d 329, 336 (2d Cir. 1979). In *Mespoulede*, the Second Circuit further explained:

> We tolerate inconsistencies in unified jury verdicts in criminal cases, not because of any singular virtue we attribute to inconsistency, but rather out of deference to the nature of the jury and the role it plays in our jurisprudence. There is no question but that a jury in a criminal trial has the power to render a verdict of acquittal that is wholly at odds with the law and the facts. . . . We recognize that

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493 U.S. 1083 (1990); *United States v. Gornto*, 792 F.2d 1028, 1034-36 (11th Cir. 1986); *Green v. United States*, 426 F.2d 661 (D.C. Cir. 1970) (per curiam); *United States v. Davis*, 369 F.2d 775 (4th Cir. 1966); *United States v. Kenny*, 236 F.2d 128 (3rd Cir. 1956); *United States v. Hans*, 548 F. Supp. 1119, 1124-6 (S.D. Ohio 1982); *United States v. Flowers*, 255 F. Supp. 485 (E.D.N.C. 1966); *Commonwealth v. Harris*, 582 A.2d 1319, 1321-2 (Pa. Super. 1990); *Ferrell v. State*, 318 Md. 235, 567 A.2d 937, 947, *cert. denied*, 110 S. Ct. 3301 (1990); *Powers v. State*, 285 Md. 269, 285, 401 A.2d 1031, 1040 (1979).

> the jury is in a sense the conscience of the community and can, for example, render a verdict to mitigate an overly severe punishment. . . . Similarly, in compromising in order to reach a unanimous verdict, a jury is often fulfilling its role as a cross-section of the community that it supposed to represent. Occasional anomalies are the price of unanimity. . . .
>
> Internal inconsistency, then, is not an end in itself, and it would be irrational to expand gratuitously the judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach contradictory results. Allowing a second jury to reconsider the very issue upon which the defendant has prevailed serves no valuable function. To the contrary, it implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the same ordeal of multiple trials, that lie at the heart of the double jeopardy clause.

Id., at 336-7; *see also State v. Aparo,* 223 Conn. at 392 (Pet. App. 9A).

Furthermore, application of collateral estoppel to the mistried count at a retrial is reconcilable with the rule that inconsistent verdicts are permissible since there is no inconsistence between an acquittal on one count and no verdict on another count having a common issue of ultimate fact. A mistrial is equivalent to no trial at all; it is not a final determination and decides no question of fact. Therefore, a jury's failure to agree, which results in a mistrial, does not establish any facts, and thus cannot

establish facts inconsistent with those established by its verdict of acquittal.

Accordingly, since the petitioner has failed to raise a substantial federal claim worthy of this Court's review in that the Connecticut Supreme Court properly applied collateral estoppel to the case at bar in accordance with the principle enunciated in *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court should deny the petition.

C. The Connecticut Supreme Court's Determination That Evidence Of A Crime Of Which The Respondent Was Acquitted Should Be Excluded At The Retrial If The Prior Jury Demonstrably Harbored A Reasonable Doubt On That Evidence And If That Evidence Would Establish An Element Of The Charged Offense Is In Accordance With Established Law.

The petitioner claimed that since collateral estoppel precludes only relitigation of ultimate issues and does not operate to bar the reuse of evidentiary facts, the Connecticut Supreme Court erred in its application of collateral estoppel in this case. *See* Petitioner's Petition at 18. However, petitioner's claim ignores this Court's holding in *Ashe v. Swenson* as well as the opinion of the Connecticut Supreme Court in this case. *See State v. Aparo*, 223 Conn. 384, 404-11 (1992) (Pet. App. at 21A-28A).

The Connecticut Supreme Court agreed that collateral estoppel precludes relitigation of ultimate facts: "[e]vidence of predicate facts, rather than ultimate facts, need not be proven beyond a reasonable doubt; and is,

therefore, not barred by collateral estoppel." *Id.*, at 407 (Pet. App. at 24A). It stated that "[c]ollateral estoppel 'means simply when an issue of ultimate fact has once been determined by a final and valid judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Aparo*, 223 Conn. at 406 (citing *Ashe v. Swenson*, 397 U.S. at 443).

The Connecticut Supreme Court reversed the trial court's decision that no evidence should be excluded at a retrial and held that "evidence of crimes of which the defendant has previously been acquitted, and concerning which the prior jury demonstrably harbored a reasonable doubt, should be excluded when it would establish an element of the charged offense and could therefore form the basis of the conviction." *Id.* at 409 (citations omitted) (Pet. App. at 26A). The court further noted the following:

> In the case now before us, at least some of the evidence that, if believed, would have established the defendant's guilt of being an accessory to murder, would also have established that, intending that the crime of murder be performed, she entered into a conspiracy with Coleman. In *Dowling*, the prior crime evidence was relevant to an essential element but would not itself, if proved, establish that essential element. ... In this case, however, like *Ashe* and unlike *Dowling*, the prior acquittal indicates that the jury necessarily rejected some evidence that, if believed, could establish essential elements of conspiracy, specifically agreement, intent to agree, and intent to kill. For example, Coleman testified that during the August 4 telephone conversations, the defendant first told him

> to kill her mother the following day after the victim had gone to bed, and then, in a later conversation, changed the plan, asking him to kill her mother that night while the defendant was still in Rowayton, because she did not want to be at home when it happened. Assuming as we are required to do, that the jury complied with the court's instructions, *its acquittal on the accessory charge requires the conclusion that it found that these alleged facts had not been proven beyond a reasonable doubt.* "Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that [the defendant had made those statements], the State could not present the same or different . . . evidence in a second prosecution . . . in the hope that a different jury might find that evidence more convincing." *Ashe v. Swenson*, at 446.

Aparo, 223 Conn. at 409-10 (Pet. App. at 26A-27A).

The Connecticut Supreme Court's decision is in accord with this Court's decision in *Ashe v. Swenson*. This Court noted in *Ashe*, that collateral estoppel "requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict *upon an issue other than that which the defendant seeks to foreclose from consideration.*" *Ashe, 397 U.S. at 444* (emphasis added). In *Ashe*, the issue that the defense sought to foreclose was the identification issue and this Court held that a rational jury must have determined that the petitioner was not one of the robbers. *Id.*, at 445. "Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that the

petitioner was one of the robbers, the State could not present the same or different identification evidence in a second prosecution ...." *Id.*, at 446.

Likewise, in the case at bar, the Connecticut Supreme Court correctly determined that the petitioner may not present the same evidence on intent to commit murder -- the common element between the acquitted count and the charged offense -- when a jury had determined on conflicting testimony that there was at least a reasonable doubt as to that evidence. As the court noted, the jury had to have rejected Coleman's testimony about the telephone call on the night before the murder as not proving beyond a reasonable doubt that she had the intent to murder her mother. This determination is in accord with the primary purpose of the doctrine of collateral estoppel, in that it protects the respondent from the unfairness of being required to relitigate an issue which a jury has already rejected.

The petitioner referred to this Court's recent decision in *Dowling v. United States*, 493 U.S. 342 (1990), and argued that this Court refused to convert collateral estoppel protection into a blanket prohibition on the reuse of evidence in a subsequent prosecution after acquittal in a prior trial. *See* Petitioner's Petition at 19-20. The Connecticut Supreme Court discussed *Dowling* at length in its decision:

> *Dowling* held that, under the facts there presented, collateral estoppel did not bar the introduction of evidence of a crime that the defendant had previously been acquitted of committing. Dowling was first tried and acquitted for robbery A.

> Thereafter, he was prosecuted for robbery B, which (unlike the two robberies for which the defendant was successively tried in *Ashe v. Swenson, supra*) occurred at a different time and place. In that trial, evidence of his conduct in committing robbery A was offered to prove his identity as the perpetrator of robbery B: in both robberies, the perpetrator had worn a ski mask, had carried a small pistol, and had been accompanied by a man named Delroy Christian. The court held that this did not constitute double jeopardy, noting that, "unlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case." The court noted that under the relevant rule of evidence, a similar act by the defendant is relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor. Because the second trial did not require the state to prove Dowling's participation in robbery A beyond a reasonable doubt, the doctrine of collateral estoppel was inapplicable.

Aparo, 223 Conn. at 406-7 (citations omitted) (Pet. App. 23A-24A). The Connecticut Supreme Court further noted that *Dowling* "does not suggest ... that the court intended to discard the well established rule that collateral estoppel may exclude evidence in certain cases." *Id.*, at 408 n.9 (Pet. App. 25A). The case at hand is distinguishable from *Dowling* in several respects. First, there were two separate robberies at issue in *Dowling*, whereas in the case at bar, the two charges revolve around the same incident. Secondly, at the respondent's second trial, the petitioner will be seeking to introduce the same evidence on the same element of the crime charged that a prior jury harbored a

reasonable doubt on -- in other words, a prior jury had already rejected the evidence as not proving beyond a reasonable doubt that the respondent intended to commit murder. It is not a situation where the petitioner is attempting to introduce prior similar act evidence under the rules of evidence. Therefore, the Connecticut Supreme Court's decision is not inconsistent with this Court's decision in *Dowling*.

The petitioner also claimed -- without any analysis or discussion -- that the Connecticut Supreme Court's application of collateral estoppel to the facts of this case conflicts with *Grady v. Corbin*, 495 U.S. 508 (1990). *See* Petitioner's Petition, at 20, however, this argument is without merit. In *Grady*, this Court held that the double jeopardy clause "bars any subsequent prosecution in which the government to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. ... The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." 495 U.S. at 521.

However, *Grady* was a pure double jeopardy case and has no bearing on the collateral estoppel analysis of double jeopardy. *Grady* did not overrule *Ashe v. Swenson*, and therefore, since the Connecticut Supreme Court based its decision on the *Ashe* analysis, *Grady v. Corbin* in inapplicable to the case at bar.[6]

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[6] If *Grady*'s "conduct constituting an offense" test applies in the collateral estoppel context in determining whether certain evidence should be excluded at a retrial, then the respondent would

Finally, the petitioner's claim that the Connecticut Supreme Court's decision conflicts with courts holding that an acquittal on one set of facts does not preclude use of the same evidence at a subsequent trial ignores the holding in *State v. Aparo*. First, the Connecticut Supreme Court did not hold that all of the evidence introduced at the first trial will be precluded at the second trial; rather, the court held only that evidence offered in the first trial must be excluded "if (1) it can be demonstrated that the jury, in acquitting the defendant of the accessory count in the first trial, harbored a reasonable doubt as to the truth of the fact sought to be proven, and (2) the alleged fact, if proven, would establish an element of the offense of conspiracy, and could, therefore, form the basis of a conviction on that count." *Aparo*, 223 Conn. at 410-11 (Pet. App. 27A-28A).

Secondly, this holding is not inconsistent with the holdings of the cases cited by petitioner. *See* Petitioner's Petition at 22-3. None of the cases relied upon by the petitioner hold that an acquittal on one set of facts *never* precludes use of the same evidence at a subsequent trial.

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prevail in this case. On the charge for which the respondent was acquitted, murder as an accessory, the petitioner had to prove three elements as charged by the trial court: (1) that the respondent intended to cause the death of her mother; (2) that with the intent to cause her mother's death, she solicited, requested, commanded, importuned or intentionally aided Dennis Coleman to cause her mother's death; and, (3) that acting with these intentions, she intended to aid, assist or join Dennis Coleman in the commission of the murder of her mother. *See* Respondent's Appendix 5A. At the retrial, the second jury will be trying to prove the same conduct; namely, that the respondent intended to cause her mother's death and that she entered into an agreement (or that she joined) to commit murder.

For example, in *United States v. Farmer*, 923 F.2d 1557 (11th Cir. 1991), the defendant was acquitted of the conspiracy count, but the jury failed to reach a verdict on the substantive count of willful deprivation of another's civil rights. On retrial of the substantive count, the defendant was convicted. On appeal, the Eleventh Circuit rejected the defendant's claim that the retrial should have been barred based upon principles of collateral estoppel. The court held that under the specific facts of that case, the jury was not presented with the same issue at retrial. The court stated that whether he entered into an agreement with state officials -- which he was acquitted of -- and whether he acted under color of state law -- as required by the substantive count -- were different issues, and therefore, collateral estoppel was inapplicable. *See Farmer*, 923 F.2d at 1563-4. The *Farmer* court did not hold that an acquittal on one set of facts *never* precludes use of the same evidence at a subsequent trial; it simply held that in that particular case, collateral estoppel was inapplicable. Therefore, *State v. Aparo* is not in conflict with either the *Farmer* decision, or with any of the other cited decisions. Rather, the Connecticut Supreme Court applied collateral estoppel to the case at bar in accordance with this Court's decision in *Ashe v. Swenson*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Connecticut Supreme Court should be denied in that the petitioner has failed to raise a substantial federal claim worthy of this Court's review since the Connecticut Supreme Court properly applied the principle of collateral estoppel to the case at bar in accordance with established law.

THE RESPONDENT

BY

HUBERT J. SANTOS
A Member of the Bar of
the Supreme Court of the
United States

No. 92-1067

In The

Supreme Court of the United States

October Term, 1992

STATE OF CONNECTICUT,

Petitioner

v.

KARIN APARO,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

APPENDICES TO BRIEF IN OPPOSITION

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No. 53529	: SUPERIOR COURT
STATE OF CONNECTICUT	: HARTFORD/NEW BRITAIN JUDICIAL DISTRICT at HARTFORD
v.	
KARIN E. APARO	: SEPTEMBER 29, 1987

INFORMATION

COUNT ONE

James E. Thomas, Assistant State's Attorney for the Judicial District of Hartford/New Britain accuses Karin E. Aparo of Glastonbury of the crime of MURDER, in violation of Connecticut General Statutes Sections 53a-54a(a) and 53a-8, and charges that at or near the town of Glastonbury, Connecticut on divers dates between July 14, 1987 and August 5, 1987 with the intent to cause the death of Joyce Aparo the defendant solicited, requested, importuned and intentionally aided Dennis Coleman to intentionally cause the death of Joyce Aparo on or about August 5, 1987 at approximately 1:56 A.M. at or near 3 Butternut Drive, Glastonbury, Connecticut.

COUNT TWO

And the said Attorney further accuses said defendant of the crime of CONSPIRACY TO COMMIT MURDER, in violation of Connecticut General Statutes Sections 53a-48 and 53a-54a(a), and charges that:

a) at or near the town of Glastonbury, Connecticut on divers dates between August 1986 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY; and

b) at or near the town of Glastonbury, Connecticut on divers dates between July 14, 1987 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY.

Transcript of Jury Charge, June 18, 1990
Beginning at page 38.

... I've just given you one instruction on the two parts of the count of conspiracy. However, it applies to both parts, so you must consider both each part separately and make a finding as to each part separately.

Beginning at page 40.
As to the second count, each part will be read separately, so the clerk will read part (a), and then ask how did the jury find the defendant, guilty or not guilty . . . and then the second part will be read, and, likewise, the foreperson will be asked.

Transcript of Jury Charge, June 27, 1990
Beginning at page 95.

THE COURT: Ladies and gentlemen, I have received your communication, "You Honor, the jury would like to rehear your Honor's instructions regarding the distinction between count two conspiracy charges (a) and (b), including examples provided by the court to illustrate this distinction." I don't recall that I gave you any examples to indicate a distinction, and in answer to your question, the distinction is only one of semantics, because if you were to find the elements of either (a) or ((b), you would necessarily find all of the elements of the other. With that, I will ask you to resume your deliberations.

Transcript of Jury Charge, June 18, 1990
Beginning at page 30.

There are three elements the State must prove beyond a reasonable doubt in order to warrant a conviction: First, the defendant intended to cause the death of her mother; second, with the intent to cause her mother's death, she solicited, requested, commanded, importuned or intentionally aided Dennis Coleman to cause her mother's death; and, third, acting with these intentions, she intended to aid, assist or join Dennis Coleman in the commission of the murder of her mother.

(3)

Supreme Court, U.S.
FILED
FEB 2 1993
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No. 92-1067

In The

Supreme Court of the United States

October Term, 1992

STATE OF CONNECTICUT,

Petitioner,

v.

KARIN APARO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

REPLY BRIEF OF PETITIONER

RICHARD N. PALMER
Chief State's Attorney
State of Connecticut

STEVEN M. SELLERS
Assistant State's Attorney
Director of Operations

SUSANN E. GILL
Supervisory Assistant State's Attorney
Appellate Unit

Counsel of Record:

JUDITH ROSSI
Assistant State's Attorney
Office of the Chief State's Attorney
340 Quinnipiac Street
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373

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I. THE QUESTION WHETHER COLLATERAL ESTOPPEL APPLIES TO THIS CASE WAS FULLY ADJUDICATED BY THE CONNECTICUT SUPREME COURT AND IS PROPERLY BEFORE THIS COURT

The respondent erroneously argues that the petitioner is precluded from raising in this Court the question whether collateral estoppel applies in the acquittal-deadlock-retrial scenario, even though, as respondent concedes, the Connecticut Supreme Court decided the question on the merits. *See*, Respondent's Brief in Opposition at 7.

Contrary to the respondent's argument, the "not pressed or passed upon" rule, explicated in *Illinois v. Gates, 462 U.S. 213 (1983)*, does not require denial or dismissal of the petitioner's claim. In *Gates*, this Court declined to consider whether there was a good faith exception to the exclusionary rule, because that issue had never been raised by the state, nor had any of the state courts through which the case had passed ever considered the question.

In the instant case, by contrast, the Connecticut Supreme court fully adjudicated the question whether collateral estoppel applies in the acquittal-deadlock-retrial scenario.

> [W]e must decide, first, whether *Ashe v. Swenson, [397 U.S. 436 (1970)]*, applies when a jury acquits on one

> count of a multicount indictment and does not reach a verdict on another count. . . . *Ashe* involved two successive proceedings against the defendant, whereas here jeopardy continues to attach from the first trial . . . and the jury could permissibly have returned inconsistent verdicts in the first trial. . . . It may, therefore, be argued that extending collateral estoppel to the context of a retrial on one or more counts of a multicount indictment cannot be reconciled with the rule that inconsistent verdicts are permissible. Moreover, because jeopardy continues, it is arguable that the second trial is not a "future lawsuit" for *Ashe* purposes. The United States Supreme Court has not addressed this issue, and it is a question of first impression for this court.

State v. Aparo, 223 Conn. 384, 391 (1992) (internal citations omitted); *see*, Appendix To Petition at 8A. The Court then rejected the inconsistent verdict and continuing jeopardy arguments against applying collateral estoppel, and the state court held that collateral estoppel did apply in the acquittal-deadlock-retrial situation. id. at 392-93; Appendix to Petition at 9A-10A. The state's motion seeking reargument and/or reconsideration of this holding was rejected. *See* Appendix to Reply Brief.

Even if this Court concludes that the petitioner's first issue was not fully preserved below, it should still grant certification on that claim.

In *Gates*, this Court identified four reasons for not considering an unpreserved question: (1) the record was

not adequately developed on the factual issue presented; (2) the state courts had not had the opportunity to consider the federal constitutional issue in the first instance; (3) the state courts had not had the opportunity to consider the question under the state constitution; and (4) the adoption of a good faith exception would modify important precedent imposing the exclusionary rule. *Illinois v. Gates*, 462 U.S. at 221-22. None of these reasons applies to preclude this Court's review in the instant case.

First, the issue is a question of law and the Connecticut Supreme Court obviously found the record fully adequate when it adjudicated the question. Second, the state supreme court had the opportunity to and did decide the federal constitutional question on the merits. *See State v. Aparo*, 223 Conn. at 389-90 (discussing federal case law regarding the applicability of *Ashe v. Swenson)*; Appendix to Petition at 6A-7A.

Third, the Connecticut Supreme Court had the opportunity to consider the question under the state constitution. It did not do so, probably because no state constitutional ground was ever raised in this case, and because Connecticut's constitution does not contain a double jeopardy clause where principles of collateral

estoppel would be located.[1] Finally, resolution of the issue by this Court would not modify any existing precedent.

As the foregoing discussion demonstrates, none of the purposes of the "pressed or passed on" rule is implicated in this case. The petitioner's first issue is properly before this Court on petition for review.

II. CONTRARY TO RESPONDENT'S REPRESENTATION, THE CONNECTICUT SUPREME COURT DID NOT PRECLUDE ON RETRIAL EVIDENCE OF INTENT TO KILL, BUT RATHER BARRED RE-USE OF EVIDENCE THAT THE DEFENDANT DID AN ACCESSORIAL ACT

On page 24 of the brief in opposition, the respondent inaccurately states that "the Connecticut Supreme Court correctly determined that the petitioner may not present the same evidence on intent to commit murder" because the jury had found "reasonable doubt as to that evidence." Intent to kill is an element common to the charges of accessory to commit murder and conspiracy to commit

---

[1] The Connecticut Supreme Court has recognized that the due process guarantees of the Connecticut constitution include the double jeopardy protection recognized at common law. *State v. Rawls*, 198 Conn. 111, 113 n.3, 502 A.2d 374 (1985); *State v. Moeller*, 178 Conn. 67,77, 420 A.2d 1153, *cert. denied*, 444 A.2d 950 (1979); *Kohlfuss V. Warden*, 149 Conn. 692, 695, 183 A.2d 626, *cert. denied*, 371 U.S. 928 (1962). Nevertheless, no Connecticut case has recognized a double jeopardy protection under the state constitution that is distinct or different from the federal double jeopardy protection.

murder. *See State v. Aparo*, 223 Conn. at 401-402. The state supreme court rejected the respondent's claim that the element of intent to kill had been decided in her favor, but concluded that the jury could have found that she did not do the requisite accessorial act.

> [T]he jury could have reached the result it did if it believed every piece of that evidence except those parts of Coleman's testimony that directly indicated that the defendant had solicited, requested, commanded, importuned, or intentionally aided him in the murder of Joyce Aparo.

State v. Aparo, 223 Conn. at 384. The state court explicitly precluded the state from reusing only that evidence that proved the respondent's accessorial acts, not her intent to kill.[2] Assuming as it did, that collateral estoppel is applicable, the state court recognized that a finding that the respondent lacked the intent to kill would

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[2] The court explicitly singled out for preclusion evidence that the respondent first told Coleman on August 4 to kill her mother on August 5, after she (respondent) returned home, then later on the evening of August 4 changed the plan, asking him to commit the murder that night, as she did not want to be there when it happened. *State v. Aparo*, 223 at 409.

But on retrial of the conspiracy count, the jury will not have to determine whether the respondent's conduct constitutes an accessorial act, as accessorial conduct is not an element of conspiracy under Connecticut law. *See State v. Aparo*, 223 Conn. at 401-402; Appendix to Petition at 18A-19A. Therefore, as the state has argued in its petition, the evidence may be used to establish predicate facts on the conspiracy count. See, Petition at 18-21.

necessarily have wholly barred retrial, because intent to kill is an essential element of the conspiracy with which the respondent is charged.

RESPECTFULLY SUBMITTED,

THE STATE OF CONNECTICUT,
PETITIONER

RICHARD N. PALMER
Chief State's Attorney

STEVEN M. SELLERS
Assistant State's Attorney
Director or Operation

SUSANN E. GILL
Supervisory Assistant State's Attorney

JUDITH ROSSI*
Assistant State's Attorney
Appellate Unit
Office of the Chief State's Attorney
340 Quinnipiac Street
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373

*Counsel of Record

January, 1993

No. 92-1067

In The

Supreme Court of the United States

October Term, 1992

STATE OF CONNECTICUT,

Petitioner,

v.

KARIN APARO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

APPENDIX

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S.C. NO. 14443

STATE OF CONNECTICUT: SUPREME COURT

V. :

KARIN APARO : AUGUST 18, 1992

STATE'S MOTION FOR REARGUMENT AND/OR RECONSIDERATION

Pursuant to Practice Book §§4122 and 4123, the State of Connecticut respectfully moves for reargument and/or reconsideration of this Court's opinion in *State v. Aparo*, 223 Conn. 384 (1992); for the reasons set forth herein.

I. BRIEF HISTORY OF THE CASE

The defendant was arrested and charged by information with one count of murder as an accessory, in violation of General Statutes §§53a-54a(a) and 53a-8; and one count of conspiracy to commit murder, in violation of §§53a-54a(a) and 53a- 48(a). A jury found the defendant not guilty on the accessory to murder count, but was unable to reach a verdict on the conspiracy count. The trial court (Corrigan, J.) then entered a judgment of acquittal on the

murder count and declared a mistrial on the conspiracy count.

After the state indicated its intent to retry the defendant on the mistried conspiracy count, the defendant filed a motion to dismiss the case, claiming, *inter alia*, that principles of double jeopardy and collateral estoppel precluded any retrial. The trial court (Damiani, J.) rejected these claims and denied the motion to dismiss. The defendant then filed an interlocutory appeal.

In a decision issued on August 11, 1992, this Court held that retrial was not barred by double jeopardy or collateral estoppel. *State v. Aparo*, 223 Conn. at 387-88, 401-04. After a thorough review of the evidence offered at the first trial, this Court rejected the defendant's claim that the jury, in acquitting the defendant on the accessory charge, necessarily found that she did not possess the requisite intent to kill her mother. This Court concluded instead that the jury may have had a reasonable doubt as to whether she had committed the accessorial act of solici-

ting, requesting, importuning or intentionally aiding Coleman to cause her mother's death. *Id.* at 403-04. The Court pointed out the reasons why the jury may not have fully credited Coleman's version of events. *Id.* at 403. "The jury therefore might, for example, have decided to believe only those portions of [Coleman's] testimony that were corroborated by [state's witnesses] DuBois and Smith, both of whom testified that the defendant had admitted discussing the murder with Coleman shortly before he killed Joyce Aparo, but neither of whom testified that the defendant had requested Coleman to do so." *Id.* at 404.

The court also held, however, that collateral estoppel could preclude the use at retrial of certain evidence or facts decided in the defendant's favor at the first trial. Thus, the Court concluded, upon retrial the trial court must exclude evidence used in the first trial if (1) the defendant can demonstrate that the jury, in acquitting her on the accessory charge, harbored a reasonable doubt as to the fact sought to be proven by that evidence; and (2)

the proffered fact, if proven, would establish an element of the offense of conspiracy. *See Id.* at 410-11. The Court expressly held that, upon retrial, "the state may not use Dennis Coleman's testimony that the defendant requested, on the night before the murder took place, that Coleman kill her mother." *Id.* at 410. The Court reasoned that the jury must have disbelieved Coleman's uncorroborated testimony that, in a phone conversation on the evening of August 4, the defendant had asked him to kill her mother. No other witness had corroborated Coleman on this point, and the defendant had expressly denied it.

II. SPECIFIC FACTS AND LEGAL ARGUMENTS IN SUPPORT OF THIS MOTION

A. The Doctrine Of Collateral Estoppel Is Limited, Like Its Parent Double Jeopardy, To Successive Prosecutions, And Has No Application To Cases of Continuing Jeopardy

This Court noted that the United States Supreme Court has not yet decided whether collateral estoppel applies in cases such as the present one, where a jury has

acquitted the defendant on one count but failed to reach a verdict on the other count. The seminal case, *Ashe v. Swenson*, 397 U.S. 436 (1970), involved successive prosecutions, and its holding is limited to attempts to relitigate legal issues in "future" lawsuits. *Dowling v. United States*, 493 U.S. 342 (1990).

> It may [ ] be argued that extending collateral estoppel to the context of a retrial on one or more counts of a multicount indictment cannot be reconciled with the rule that inconsistent verdicts are permissible. Moreover, because jeopardy continues [to attach from the first trial through the second trial], it is arguable that the second trial is not a "future lawsuit" for Ashe purposes.

State v. Aparo, 223 Conn. at 391. This Court, held, nevertheless, that collateral estoppel does apply in the context of the present case. *Id.* at 391-92.

This Court should reconsider this point. Although the United States Supreme Court has not yet expressly decided the issue, its opinion in *Ohio v. Johnson*, 467 U.S. 493 (1984), casts serious doubt on this Court's holding. In

that case the Court rejected the defendant's claim that under *Ashe v. Swenson*, his guilty plea to one count of a multicount indictment barred the state from trying him on the remaining counts. The Court held that *Ashe* was inapplicable, because the taking of a guilty plea wa not the same as a trial on the merits. In *dicta* the Court also said, "[W]here the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." 467 U.S. at 500 n.9.

It is evident from this quoted statement that the United States Supreme Court never intended *Ashe* to apply to cases such as the present one, where the state tried both counts simultaneously and jeopardy continues to attach from the first trial. *See United States v. Farmer*, 923 F.2d 1557, 1563 n.12 (11th Cir. 1991) (questioning whether collateral estoppel even applies in cases of continuing jeopardy); *Butler v. Maryland*, 605 A.2d 186, 202 n.13 (Md.

1992) (same); *see also United States v. Seijo*, 537 F.2d 694, 699 (2d Cir. 1976) (declining to decide whether collateral estoppel applies to retrials of multicount indictments).

This limitation on the use of collateral estoppel is consistent with the constitutional principles of double jeopardy. Double jeopardy by its terms applies only where original jeopardy has been terminated. *Price v. Georgia*, 398 U.S. 323, 329 (1970). Collateral estoppel, which is after all a component of double jeopardy and derives its constitutional significance therefrom, should not apply where the right against double jeopardy is not even implicated because of continuing jeopardy. *See Richardson v. United States*, 468 U.S. 317, 325 (1984) (failure of jury to reach verdict is not event terminating jeopardy; double jeopardy does not prevent retrial regardless of sufficiency of evidence on mistried count at first trial).

The continuing jeopardy situation is analogous to a case where a defendant is acquitted on the greater charge

but convicted of a lesser included offense. If that conviction is overturned on appeal, the state may retry the defendant on the lesser offense, even though the acquittal on the greater charge bars retrial on that count. *Price v. Georgia*, *supra*. At such a retrial after reversal on appeal, the state would not be barred from reusing any evidence relevant to the retried count, even though it had also been used at the first trial to prove the acquitted count.

In holding that collateral estoppel applied in the continuing jeopardy situation, this Court relied heavily on *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979), which is of questionable validity for two reasons.

First, *Mespoulede* was decided prior to *Ohio v. Johnson* and *Richardson v. United States.* In light of these more recent decisions, its conclusion that collateral estoppel should apply in the continuing jeopardy situation deserves reconsideration.

Second, *Mespoulede* erroneously holds that collateral estoppel may bar relitigation of any evidentiary facts introduced at the first trial; 597 F.2d at 334; a concept soundly rejected by the United States Supreme Court in *Dowling*, which refused to extend *Ashe* to exclude, in all circumstances, use of relevant and probative evidence simply because it relates to prior acquitted conduct.

B. This Court Construed Collateral Estoppel Too Broadly When It Held That The Doctrine May Preclude The State From Using Evidence That The Defendant Asked Coleman To Kill Her Mother, Where Upon Retrial That Evidence Alone Will Not Determine An Element Of The Conspiracy Count

The United States Supreme Court has not yet decided whether the doctrine of collateral estoppel includes an evidentiary estoppel component, to prevent the state from reusing evidence at a retrial, where the first trial resulted in an acquittal and a deadlock on related counts. Neither *Ashe v. Swenson*, *supra*, nor *Dowling v. United States*, *supra*, expressly controls, as both of those

cases involved successive prosecutions, not retrial of a mistried count after an acquittal and deadlock on related counts.[1] Even if evidentiary estoppel may apply in a case of continuing jeopardy, it has no application in the present case. In *Ashe*, the Court held that the second prosecution was barred because the state sought to relitigate the same *legal issue*, i.e. identity, that the first trial had resolved in the defendant's favor. *Ashe* does not preclude the use of prior acquitted conduct where the prior acquitted conduct "did not determine an ultimate issue in the *present* case." *Dowling v. United States*, 110 S.Ct. at 672 (emphasis supplied).

"Collateral estoppel prevents the use of the prior acquitted conduct only if *the legal or federal issue regarding the conduct is identical* to the issue in the first trial *and* was decided in the defendant's favor." *United States v.*

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[1] Even in the successive prosecution context, an overlap of proof does not bar successive trials of a conspiracy and the underlying substantive crime. *United States v. Felix*, ___ U.S. ___, 112 S.Ct. 1377 (1992).

Davis, 809 F.2d at 1206 (citations omitted) (first emphasis supplied, second emphasis in original); *United States v. DeVincent*, 632 F.2d 155, 158-59 (1st Cir. 1980), *cert. denied*, 450 U.S. 984 (1981) (defendant did not show that acquittal on first count involved determination of any element of second mistried count). "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." *Grady v. Corbin*, 110 S.Ct. 2084 (1990).

Where the element resolved in the defendant's favor at the first trial is only an evidentiary fact at the second trial, collateral estoppel will not bar its reuse. Dowling v. *United States*, *supra*; *Flittie v. Solem*, 751 F.2d 967, 972 (8th Cir. 1985), cert. denied, 475 U.S. 1025 (1986); *see* Note, "Collateral Estoppel Effect of Prior Acquittals," 46 Brooklyn L.Rev. 781, 788-90 (1980).

While this Court purported to recognize these principles, it nevertheless afforded an overly expansive inter-

pretation of Ashe to bar not only the relitigation of ultimate facts, but also to foreclose the introduction of evidentiary facts which the Court deemed necessarily established in the defendant's favor at the first trial.

In the present case, the state will not have to prove on retrial that the defendant acted as an accessory in order to prove conspiracy to commit murder. While the evidence that the defendant asked Coleman to kill her mother was an ultimate fact in the first trial on the accessory count, in that it could have proved, without more, the accessorial act (that she solicited or requested that he kill the victim), it will not be an ultimate fact at the retrial of the conspiracy count. Accordingly, the state will not be relitigating an ultimate fact, or the same legal issue, i.e., solicitation or request as an accessorial act.

Standing alone, the fact that the defendant asked Coleman to kill her mother proves neither an unlawful agreement nor any other essential element or "ultimate fact" of the crime of conspiracy. Viewed in context with

other evidence, however, it may permit the jury to infer the defendant's participation in a conspiratorial agreement, or to infer that she possessed the requisite intent to kill her mother. Thus at the second trial the evidence that the defendant asked Coleman to kill her mother will be an evidentiary fact that merely tends to prove, when considered with other evidence, the element of agreement or intent on the conspiracy count.[2]

Courts in other jurisdictions have refused to apply collateral estoppel to preclude the re-use of evidence relevant to both counts at the first trial, where proof of an element on the retried charge will not depend solely on the prior acquitted conduct. *See, e.g., United States v. Farmer,* 923 F.2d at 1564 and n. 16; *United States v. Dray*, 901 F.2d 1132, 1138 (1st Cir. 1990); *United States v. Davis*, 809

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[2] As this Court recognized, "[e]vidence of predicate facts, rather than ultimate facts, need not be proven beyond a reasonable doubt and is, therefore, not barred by collateral estoppel." *State v. Aparo*, 223 Conn. at 407.

F.2d 1194, 1206 (6th Cir. 1987); *Flittie v. Solem*, 751 F.2d at 972.

The test formulated by this Court for determining whether evidence may be reused on retrial is too restrictive and almost impossible to apply. The Court in the present case has wholly failed to consider that the evidence of the defendant's conduct offered at the first trial was relevant to both counts and was inextricably intertwined. All of the evidence admitted at the defendant's first trial had independent significance on each count, and none of it related solely to the acquitted charge. It is not possible to tease out, with any degree of certainty, which evidentiary facts supported the accessory count alone. *See Grady v. Corbin*, *supra* (rejecting same evidence test); *Dowling v. United States*, 493 U.S. at 348 (refusing to extend Ashe to exclude, in all circumstances, relevant and probative evidence simply because it relates to acquitted conduct); *United States v. Farmer*, 923 F.2d at 1524 ("immaterial" that prosecution had in earlier trial

used same evidence to prove element of count on which jury acquitted defendant).

Alternatively, this Court should revise its opinion to expressly state that, on remand, the trial court should exclude only that evidence that the defendant can show went solely to the acquitted charge of accessory to murder. *See In re Juvenile Appeal (83-DE)*, 190 Conn. 310 (1983) (collateral estoppel does not require blanket preclusion of all evidence, without regard to whether it was relevant solely to an issue necessarily decided by prior judgment).

III. LEGAL GROUNDS RELIED UPON

The state relies on Practice Book §§4122 and 4123 in support of this motion.

Respectfully submitted,
STATE OF CONNECTICUT
By: /s/ Judith Rossi
JUDITH ROSSI
Assistant State's Attorney
Appellate Unit
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, CT 06492
Tel. 265-2373

CERTIFICATION

I hereby certify that a copy of this motion was mailed to Hubert Santos, Esquire and Hope Seeley, Esquire, Santos, Peck, & Smith, P.C., 51 Russ Street, Hartford, CT 06106 on August 18, 1992.

/s/ Judith Rossi
JUDITH ROSSI
Assistant State's Attorney

S.C. NO. 14443

STATE OF CONNECTICUT: SUPREME COURT

V. :

KARIN APARO : AUGUST 18, 1992

ORDER

THE MOTION OF THE STATE OF CONNECTICUT, FILED AUGUST 19, 1992, FOR RE-ARGUMENT AND/OR RECONSIDERATION HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT

/s/ Francis J. Drumm
Chief Clerk

NOTICE SENT; 9/18/92
JUDITH ROSSI, A.S.A.
SANTOS, PECK & SMITH, P.C.
CLERK, HARTFORD J.D.
(53529)
HON. RICHARD A. DAMIANI
REPORTER OF JUDICIAL DECISIONS

(2) 92-1308
No. 92-1067 (4)

Supreme Court, U.S.
FILED
FEB 12 1993
OFFICE OF THE CLERK

In The
Supreme Court Of The United States
October Term, 1992

STATE OF CONNECTICUT,
Petitioner,

v.

KARIN APARO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

Counsel of Record:

JUDITH ROSSI
Assistant State's Attorney
Office of the Chief State's Attorney
340 Quinnipiac Street
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373

RICHARD N. PALMER
Chief State's Attorney
State of Connecticut

STEVEN M. SELLERS
Assistant State's Attorney
Director of Operations

SUSANN E. GILL
Supervisory Assistant State's Attorney
Appellate Unit

12 pp

QUESTIONS PRESENTED

I. **Did the Connecticut Supreme Court correctly hold that the Double Jeopardy Clause does not bar retrial of the conspiracy count, where the jury at the first trial deadlocked seven to five for acquittal on that count?**

II. **Did the Connecticut Supreme Court correctly conclude that the doctrine of collateral estoppel does not bar retrial, because the cross-petitioner failed to demonstrate that the jury, in acquitting her on the murder count, had actually decided an element of the conspiracy count in her favor?**

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V (in relevant part):

. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . .

Constitution of the United States, Amendment XIV, Section I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes Section 53a-8:

Criminal liability for acts of another. A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

Connecticut General Statutes Section 53a-48(a):

Conspiracy. (a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

Connecticut General Statutes Section 53a-54a(a):

Murder. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception' except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

STATEMENT OF THE CASE

The cross-respondent hereby adopts and incorporates the Statement of the Case set forth in the state's Petition for Certiorari at pages 7-11.

REASONS FOR DENIAL OF THE CROSS-PETITION

I. The Cross-Petition Cites No Precedent Or Relevant Authority For The Contention That The Double Jeopardy Clause Bars Retrial Of The Conspiracy Count Where The Twelve-Member Jury Deadlocked Seven To Five In Favor Of Acquittal On The Mistried Count

The cross-petitioner elected to be tried before a jury of twelve. She now contends that because she had initially had a statutory right to have the conspiracy count tried to a six person jury, and six persons on the deadlocked jury voted for acquittal, retrial is precluded by the double jeopardy protection against a second prosecution for the same crime.[1]

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[1] In her cross-petition to this Court the cross-petitioner raises for the first time a due process ground for this claim. This case was before the Connecticut Supreme Court on an interlocutory appeal (continued...)

The Connecticut Supreme Court rejected this claim, noting that, pursuant to Connecticut's statutory scheme on jury trials, "had the defendant preferred a jury of six, she could have so elected." *State v. Aparo*, 223 Conn. at 388. The state supreme court also concluded that, in light of "settled doctrine in Connecticut that a valid jury verdict in a criminal case must be unanimous" the vote tally of the deadlocked jury was "legally irrelevant." *State v. Aparo*, 223 Conn. at 388.[2] The cross-petitioner has not demonstrated that the state court's pronouncements on state law violate the federal constitution or otherwise raise any federal question.

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[1](...continued)
challenging on double jeopardy grounds the denial of a motion to dismiss. Because the due process ground was neither raised or decided in the Connecticut Supreme Court, it is not properly before this Court and should not be reviewed. Illinois v. Gates, 462 U.S. 213, 218 (1983)(only in exceptional cases arising in federal courts will this Court consider claims not pressed or passed upon below).

[2] The state supreme court also recognized that this claim could not be addressed without rank speculation regarding the composition of a six person jury had the cross-petitioner so chosen that number of jurors for her jury trial. *State v. Aparo*, 223 Conn. at 388.

The cross-petitioner fails to point to any precedent for her contention that retrial after deadlock is constitutionally barred by the double jeopardy clause. She proffers, as sole support for her claim, *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), which is factually and legally inapposite. The cross-petitioner contends that that case stands for the proposition that an acquittal can arise from a situation other than a unanimous jury verdict. In *Martin Linen Supply Co.*, the trial court granted the defendant's motion for a judgment of acquittal after the jury had deadlocked. Thus a final judgment of acquittal was entered and the government was precluded from taking an appeal.

By contrast, the trial court in the instant case declared a mistrial on the deadlocked conspiracy count. *State v. Aparo*, 223 Conn.384,386 (1992); Appendix To Petition at 3A. As a result, no final judgment of acquittal was ever entered on that count, and jeopardy has not yet terminated on the conspiracy charge. *Richardson v. United States*, 468 U.S. 317 (1984). Thus the deadlock in this case bears no similarity to the judgment of acquittal in

II. The Connecticut Supreme Court's Conclusion That The Cross-Petitioner Failed To Show That The Jury Actually Decided An Element Of The Conspiracy Count In Her Favor Is Fact-Bound And Does Not Raise A Substantial Federal Question

The cross-petitioner contends that the Connecticut Supreme Court erred in rejecting her claim that the jury, by acquitting her of murder, necessarily decided elements of the mistried conspiracy count in her favor. *See Dowling v. United States*, 493 U.S. 342, 350 (1990)(defendant bears burden of showing that issue was actually decided in her favor); *United States v. DeVincent*, 632 F.2d 155, 158-59 (1st Cir. 1980), *cert. denied*, 450 U.S. 984 (1981) (defendant did not show that acquittal on first count involved determination of any element of second mistried count). In considering the cross-petitioner's claim, the Connecticut Supreme Court was fully cognizant that the collateral estoppel doctrine is not to be applied in a "technically restrictive manner." *State v. Aparo*, 223 Conn. at 390; Appendix To Petition at 7A. There is

nothing to substantiate the cross-petitioner's contention that the state court acted in an unreasonable or irrational manner in applying the collateral estoppel doctrine.

A court's inquiry into what the first jury actually determined is necessarily fact-bound and may require a painstaking review of all of the record. Here the trial court, in denying the motion to dismiss, performed a careful analysis of the evidence at the first trial, and the Connecticut Supreme Court in reviewing that ruling did the same. 223 Conn. at 393-401; Appendix To Petition at 10A-18A. In asking this Court to perform the same evidentiary review already performed by the state courts, the cross-petitioner misperceives the nature of the writ. This Court "does not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.).

Additionally, the cross-petitioner has failed to raise a substantial federal question. The state courts' conclusion that the first jury did not actually decide an element of the mistried conspiracy count in the defendant's favor has little or no significance outside the

circumstances of this case.[3]

The cross-petitioner also contends that the trial court's jury instructions "collapsed the distinction between the accessory statute and the conspiracy statute." Cross-Petition at 19. The state supreme court rejected her interpretation of the statutory and instructional language involved. *State v. Aparo*, 223 Conn. at 401-2 n.61; Appendix To Petition at 18A-19A.[4] The cross-petitioner

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[3] Moreover, as the state argued below, if the jury in acquitting the cross-petitioner on the murder count had unanimously agreed that she lacked the specific intent to kill, they would have acquitted her not only of murder, but also of conspiracy to commit murder, which contained the element of intent to kill. *See*, *State v. Aparo*, 223 Conn. at 401-2; Appendix To Petition at 18A-19A (explaining elements of the crimes charged). The fact that some jurors voted for conviction on the conspiracy count refutes the cross-petitioner's claim that the jury actually concluded that she lacked the intent to kill her mother when they unanimously acquitted her of murder.

[4] The Connecticut Supreme Court held that the challenged instruction, when considered in context, "did not permit the jury to substitute a conspiracy for [the accessorial] acts[,]" nor did it equate "intent to join" with any accessorial act, or with the conspiratorial act of entering into an agreement. *State v. Aparo*, 223 Conn. at 401-2 n.6; Appendix To Petition at 18A-19A. The state supreme court expressly found that the challenged instruction "did not weaken the

(continued...)

is merely asking this Court to delve into the idiosyncracies of a state trial court's jury charge. Such a claim is not constitutional in nature and is not worthy of this Court's certiorari jurisdiction.

RESPECTFULLY SUBMITTED,

STATE OF CONNECTICUT

CROSS-RESPONDENT

JUDITH ROSSI
Assistant State's Attorney
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, CT 06492
Tel. (203)265-2373
Federal Bar No.ct 07360
COUNSEL OF RECORD

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[4](...continued)
state's burden of proving accessorial acts and did not permit the jury to substitute a conspiracy for such acts." *Id.*